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

LAVOYCE R. BILLINGSLEY,
Petitioner,

v.

ZUNIGA, Warden,
Respondent.

Case No. 1:15-cv-00279 MJS (HC)

**FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS**

(Doc. 1)

**ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT COURT JUDGE TO
THE PRESENT MATTER**

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 February 23, 2015. He is currently incarcerated at Federal Correctional Institution Mendota. Petitioner was convicted in the Northern District of Illinois of conspiracy to possess with the intent to distribute less than 500 grams of cocaine, possession of a firearm in furtherance of a drug trafficking crime, and possession of a firearm by a felon. See United States v. Billingsley, 2010 U.S. Dist. LEXIS 2618 (N.D. Ill. Jan. 12, 2010). Petitioner was sentenced on January 20, 2010 to 160 months imprisonment. (See Pet. at 2.) Presently, Petitioner asserts that his due process rights under the Fifth Amendment were violated. (See generally Pet, ECF No. 1.)

1 **I. SCREENING THE PETITION**

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

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

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

24 **II. JURISDICTION**

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

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

6 Petitioner did not lack an unobstructed opportunity to present his claims in his §
7 2255 motion. After his conviction, Petitioner filed a motion for acquittal or alternatively, a
8 new trial. United States v. Billingsley, 2010 U.S. Dist. LEXIS 2618 (N.D. Ill. Jan. 12,
9 2010). In the motion, Petitioner argued that there was insufficient evidence, and that
10 several of the evidentiary rulings during trial were prejudicial. The motion was denied in a
11 reasoned decision on July 12, 2010. (Id.) Petitioner next filed a motion to vacate, set
12 aside or correct his sentence under 28 U.S.C. § 2255 on May 22, 2012. United States v.
13 Billingsley, 2012 U.S. Dist. LEXIS 182313 (N.D. Ill. Dec. 27, 2012). In the motion, he
14 alleged eight separate grounds based on alleged ineffectiveness of counsel. (Id.) The
15 court of conviction denied the motion on December 27, 2012. (Id.)

16 Petitioner states that at the time of filing his § 2255 petition, the case law was not
17 in his favor, and therefore § 2255 was an insufficient basis for presenting his claims. The
18 fact that Petitioner's § 2255 motion was denied because the law did not support his
19 contentions is not a sufficient basis to show that he lacked an unobstructed opportunity
20 to present his claims. Ivy v. Pontesso, 328 F.3d 1057, 1060 (9th Cir. 2003). Furthermore,
21 even if Petitioner presents claims of innocence, which it does not appear that he has
22 done in this present petition, such claims can be raised by an initial § 2255 motion. Id.
23 Petitioner has not attempted to present the claims he now raises, and has not provided
24 sufficient reason as to why he could not have presented the claims earlier.

25 To the extent Petitioner argues that his present claims support his innocence, the
26 claims are not supported by credible evidence. Petitioner asserts that there was
27 improper governmental conduct involving the use of a false stash house and confidential
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1 informants. (See Pet. at 13-14.) Petitioner's claims are not supported by any tangible or
2 concrete evidence supporting his innocence. Instead they are general allegations of
3 government misconduct provided without any specific details regarding potential
4 exculpatory evidence.

5 In Bousley v. United States, 523 U.S. 614 (1998), the Supreme Court explained
6 that, "[t]o establish actual innocence, petitioner must demonstrate that, in light of all the
7 evidence, it is more likely than not that no reasonable juror would have convicted him."
8 Id. at 623 (internal quotation marks omitted). See also Ivy v. Pontesso, 328 F.3d at 1060.
9 Petitioner bears the burden of proof on this issue by a preponderance of the evidence,
10 and he must show not just that the evidence against him was weak, but that it was so
11 weak that "no reasonable juror" would have convicted him. Lorentsen v. Hood, 223 F.3d
12 950, 954 (9th Cir. 2000). Petitioner has not met this standard.

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

17 **III. RECOMMENDATION**

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

20 It is further ORDERED that the Clerk of Court to assign a District Court Judge to
21 the present matter.

22 These Findings and Recommendations are submitted to the assigned United
23 States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B)
24 and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern
25 District of California. Within thirty (30) days after being served with a copy, Petitioner
26 may file written objections with the Court. Such a document should be captioned
27 "Objections to Magistrate Judge's Findings and Recommendations. The Court will then
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1 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties
2 are advised that failure to file objections within the specified time may waive the right to
3 appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir.
4 2014).

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IT IS SO ORDERED.

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Dated: March 3, 2015

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/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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