

1 the following reasons, the undersigned recommends Respondent’s Motion be granted, and the
2 Petition be dismissed.²

3 **I. BACKGROUND**

4 Nichols, a federal prisoner, is serving a 151-month sentence for his 2014 plea-based
5 conviction for bank robbery in violation of 18 U.S.C. § 2113(a) entered by the U.S. District Court
6 for the District of North Dakota (“DND”). *See U.S. v Nichols*, Case No. 1:14-cr-00102-DLH-1
7 (D.N.D. Jan. 26, 2015), Crim. Doc. No. 26³; (Doc. No. 1 at 1, 9-10). At sentencing, the United
8 States argued that Nichols was a career offender under the United States Sentencing Guidelines
9 (“USSG”) § 4B1.1. due to Nichols’ prior Arizona state bank robbery⁴ and burglary convictions.
10 *Nichols*, No. 1:14-cr-00102-DLH-1 at Crim. Doc. No. 33 at 1-2. The trial court calculated
11 Petitioner’s offense level at 29, after a three-level reduction for acceptance, a criminal history
12 category VI, and a sentencing guideline range of 151-188 months. (Doc. No. 18-1 at 111; Cr,
13 Doc. 57 at 6). The Government asked the court to impose a 168-month sentence. (Doc. No 18-1
14 at 112; Cr. Doc. No. 57 at 7). Defense requested, but the trial court chose not to grant, a
15 downward variance to Nichols’ sentence. (*Id.* at 120). During sentencing, the trial court noted
16 this was Nichols’ third bank robbery and imposed a sentence of 151-months, which was “at the
17 low end of the advisory sentencing guidelines.” (Doc. No. 18-1 at 119-120). Nichols did not file
18 a direct appeal. (Doc. No. 1 at 10).

19 On June 13, 2016, Nichols moved to correct his sentence under 28 U.S.C. § 2255 claiming
20 *Johnson v. United States*, 135 S. Ct. 2551 (2015) invalidated his career offender status. *Nichols*,
21 No. 1:14-cr-00102-DLH-1, Crim. Doc. No. 42-1. Nichols voluntarily dismissed his § 2255
22 motion in light of the Supreme Court’s holding in *Beckles v. United States*, 137 S. Ct. 886
23 (2017).⁵ *Id.*, Crim. Doc. No. 52. On September 10, 2018, Nichols filed a second § 2255 Motion

24 ² This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local
25 Rule 302 (E.D. Cal. 2019).

26 ³ The undersigned cites to the record in Nichols’ underlying DND criminal case as “Crim. Doc.
27 No. __.”

28 ⁴ Nichols actually had two state bank robbery convictions in addition to this burglary of an occupied
dwelling. (Doc. No. 18-1 at 111).

⁵ In *Beckles v. United States*, 137 S. Ct. 886 (2017), the Supreme Court held “that *Johnson* does not apply
retroactively to the United States Sentencing Guidelines and did not stand for the proposition that the

1 reasserting his previously withdrawn *Johnson* claim. *Id.*, Crim Doc. Nos. 58, 59. The DND
2 dismissed the § 2255 motion as time barred. *Id.*, Crim. Doc. No. 62. On February 28, 2020,
3 Petitioner moved for a reduction of his sentence under the First Step Act. *Id.*, Crim. Doc. No. 64.
4 The DND denied Petitioner’s motion and his motion for reconsideration. *Id.*, Crim. Doc. Nos. 66,
5 69.

6 Although enumerated as four separate grounds, the Petition raises only one ground for
7 relief: Because Nichols’ prior burglary conviction does not qualify as a crime of violence under
8 § 4B1.1 under *Mathis v. United States*, 136 S. Ct. 2243 (2016), *Descamps v. United States*, 570
9 U.S. 254 (2013), and *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020), Nichols is actually innocent of
10 the career offender enhancement. (*Id.* at 6-7). Petitioner argues § 2255 is inadequate and he was
11 otherwise unable to previously present his claims in his previous § 2255 motions because *Mathis*
12 has not been deemed retroactive by the Eighth Circuit and *Allen* was decided after the statute of
13 limitations ran on his § 2255 motion. Thus, Nichols argued he did not have an unobstructed
14 procedural shot to present his claim.

15 II. APPLICABLE LAW AND ANALYSIS

16 Although brought under the guise of § 2241, Nichols challenges the legality of his
17 sentence, which is properly brought via a § 2255 petition in the DND court of conviction. A
18 § 2241 petition is reserved for federal prisoners challenging “the manner, location, or conditions
19 of a sentence’s execution.” *Harrison v. Ollison*, 519 F.3d 952, 956 (9th Cir. 2008). Federal
20 prisoners seeking to challenge the legality of their confinement must do so through a § 2255
21 motion. *See Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012). In limited circumstances,
22 federal prisoners may challenge the legality of their confinement through a § 2241 petition by
23 utilizing the so-called “savings clause” or “escape hatch” provision of § 2255(e). *Id.* at 1192.
24 This portal permits a federal prisoner to challenge the legality of confinement if he can establish
25 that the remedy provided under § 2255 is “inadequate or ineffective to test the legality of his
26 detention.” 28 U.S.C. § 2255(e). To demonstrate a remedy is “inadequate or ineffective” a

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residual clause therein was void for vagueness.” *Id.*

1 petitioner must: (1) make a claim of actual innocence, and (2) not had an “unobstructed
2 procedural shot at presenting that claim.” *Shepherd v. Unknown Party, Warden, FCI Tucson*, No.
3 19-15834, ___ F. 4th ___, 2021 WL 3085784 *1 (9th Cir. July 22, 2021). A prisoner cannot
4 circumvent the limitations imposed on successive petitions by restyling his petition as one under
5 § 2241. *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006); *Moore v. Reno*, 185 F.3d 1054,
6 1055 (9th Cir. 1999) (per curiam) (petitioner attempted to circumvent AEDPA’s successive
7 motion provisions by bringing § 2255 claims in a § 2241 petition).

8 A factual claim of actual innocence requires a petitioner to “demonstrate that, in light of
9 all the evidence, it is more likely than not that no reasonable juror would have convicted him.”
10 *Stephens*, 464 F.3d at 898 (citing *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L.
11 Ed. 2d 828 (1998)). Nichols does not dispute the validity of his underlying plea-based conviction
12 for bank robbery. Even if Nichols did advance such a claim, his attempt would fail. Nichols pled
13 guilty to his crime of conviction. Therefore, any claim of actual innocence is fully inconsistent
14 with his plea of guilty, which is entitled to a strong presumption of truth. *See Muth v. Fondren*,
15 676 F.3d 815, 821-22 (9th Cir. 2012) (finding that petitioner was not entitled to application of the
16 § 2255 escape hatch where his claim of actual innocence was contradicted by his guilty plea); *see*
17 *also Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (“[T]he representations of the defendant [at
18 a plea hearing] . . . constitute a formidable barrier in any subsequent collateral proceedings.
19 Solemn declarations in open court carry a strong presumption of verity.”); *United States v. Ross*,
20 511 F.3d 1233, 1236 (9th Cir. 2008) (“Statements made by a defendant during a guilty plea
21 hearing carry a strong presumption of veracity in subsequent proceedings attacking the plea.”).
22 Therefore, Nichols has failed to show that he is factually innocent of his crime of conviction.

23 Instead, Nichols argues he is actually innocent of his career offender status because one of
24 his predicate offenses no longer qualifies as crime of violence under current caselaw. (Doc. No. 1
25 at 17). Specifically, Nichols argues that “his prior burglary convictions are not predicate offenses
26 within [USSG] § 4B1.2(a)’s elements clause or § 4B1.2(b) enumerated offenses. Nichols relies
27 on *Allen v. Ives* in making his claim of innocence. 950 F.3d 1184; (Doc. No. 1 at 12). In *Allen*,
28 the Ninth Circuit found the petitioner stated a claim of actual innocence and qualified for escape

1 hatch jurisdiction under § 2255(e) because his federal sentence was enhanced under the career
2 offender provisions of USSG §§ 4B1.1 and 4B1.2, due to his underlying state-level controlled
3 substance convictions. Petitioner Allen had been sentenced under the pre-*Booker*⁶ mandatory
4 sentencing framework in effect at the time of his sentencing. Petitioner Allen argued because one
5 of his underlying convictions was not a predicate crime for career offender status under newly
6 decided and retroactive Supreme Court case law (*Mathis*, 136 S. Ct. 2243 and *Descamps*, 570
7 U.S. 254), he was actually innocent of being a career offender. The Ninth Circuit agreed,
8 concluding that if petitioner’s predicate conviction for career offender status under the mandatory
9 sentencing guidelines no longer qualified as such, then the factual predicate for petitioner’s
10 mandatory sentencing enhancement did not exist.

11 However, in *Shepard* the Ninth Circuit limited its holding in *Allen* to petitioners who
12 “received a mandatory sentence under a mandatory sentencing scheme.” 2021 WL 3085784, at
13 *3. Here, unlike *Allen*, Nichols was sentenced within a sentencing range set forth by the advisory
14 sentencing guidelines, not the mandatory sentencing scheme. (*See* Doc. No. 18-1 at 119-120).
15 Thus, Nichols cannot show that he is actually innocent of his career offender status; and thus, he
16 fails to make a claim of actual innocence as required by the escape hatch provision of § 2255(e).

17 Because Nichols has failed to demonstrate he is actually innocent, the Petition fails as a
18 matter of law. Accordingly, the Court need not address the “unobstructed procedural shot” prong
19 of the escape hatch. *See Renderos v. Langford*, No. 2:17-CV-09213-CAS, 2019 U.S. Dist.
20 LEXIS 69704, at *11-12 (C.D. Cal. Apr. 24, 2019); *Nguyen v. Babcock*, No. 2:11-cv-2516 EFB
21 P, 2012 U.S. Dist. LEXIS 122458, at *4 (E.D. Cal. Aug. 27, 2012) (“The court need not address
22 whether petitioner had an unobstructed procedural shot at pursuing his claim because, even
23 assuming that he did not, he has failed to show that he is actually innocent.”). Based on the
24 foregoing reasons, the Court recommends that Nichols’ § 2241 Petition be denied.

25 Accordingly, it is **RECOMMENDED**:

26 1. Respondent’s Motion to Dismiss (Doc. No. 18) be GRANTED.

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28 ⁶ *U.S. v. Booker*, 543 U.S. 220 (2005).

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2. The Petition (Doc. No. 1) be DISMISSED.

NOTICE TO PARTIES

These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being served with these findings and recommendations, a party may file written objections with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” A response to any Objections must be file within fourteen (14) of the date of service of the Objections. Parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

Dated: August 12, 2021


HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE