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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARK ANTHONY CLEARMAN,  
  
                            Petitioner,  
  
                    v.  
  
B.M. TRATE,  
  
                            Respondent.

Case No. 1:22-cv-00444-HBK (HC)  
  
ORDER GRANTING RESPONDENT’S  
MOTION TO DISMISS <sup>1</sup>  
  
(Doc. No. 7)

          Petitioner Mark Anthony Clearman (“Petitioner”), a federal prisoner, initiated this action by filing a pro se petition for writ of habeas corpus under 28 U.S.C. § 2241 while incarcerated in Atwater Penitentiary, located in Merced County, California, which is within the venue and jurisdiction of this Court. (Doc. No. 1, “Petition”). The Petition raises two grounds for relief that, taken together, advance a claim that Petitioner is actually innocent of his mandatory minimum life sentence because his prior state drug offense, known as a “wobbler” under California law, is no longer a qualifying predicate felony conviction for the purposes of sentence enhancement under 21 U.S.C. § 841(b) and § 851. Respondent filed a Motion to Dismiss the

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<sup>1</sup> Both parties have consented to the jurisdiction of a magistrate judge, in accordance with 28 U.S.C. § 636(c)(1). (Doc. No. 14).

1 Petition on the basis that the Court lacked jurisdiction to review the § 2241 petition because the  
2 “escape hatch” of 28 U.S.C. § 2255 does not apply. (Doc. No. 7, “Motion”). On August 29,  
3 2022, Petitioner filed an opposition to the Motion. (Doc. No. 12). For the reasons set forth more  
4 fully herein, the Court grants Respondent’s Motion to Dismiss.

## 5 I. BACKGROUND

### 6 A. Procedural History

7 Petitioner, a federal prisoner, is serving a mandatory life sentence, after a jury trial, for  
8 conspiracy to distribute phencyclidine (“PCP”) in violation of §§ 841(a)(1) and 841(b)(1)(A),  
9 entered by the United States District Court for the Western District of Missouri (“WDMO”). *See*  
10 *United States v. Edwards, et al.*, 4:91-cr-00089-BCW-3, Crim. Doc. Nos. 226, 579 (W.D. Mo.).<sup>2</sup>  
11 Based on two prior felony drug convictions, including a 1981 California state conviction for  
12 possession of cocaine, Petitioner was sentenced to life imprisonment pursuant to 21 U.S.C. § 851  
13 and § 841(b). *Id.* at 499, 702. Petitioner’s conviction and sentence were affirmed on direct  
14 appeal by the United States Court of Appeals for the Eighth Circuit. *Id.* at Crim. Doc. No. 799;  
15 *United States v. Mabry*, 3 F.3d 244, 146-47 (8th Cir. 1993) (“California court records establish  
16 that, whether or not Clearman negotiated a misdemeanor-level punishment by pleading guilty, he  
17 was convicted of a drug felony under California law that is a proper predicate offense under 21  
18 U.S.C. 21 U.S.C. § 841(b)”).

19 On April 8, 1998, the WDMO denied Petitioner’s motion to vacate his conviction and  
20 sentence under 28 U.S.C. § 2255. *Clearman v. United States*, 4:97-cv-00648-CV-W-DW (W.D.  
21 Mo.). From 2007 to the present, Petitioner has filed multiple unsuccessful post-conviction  
22 motions largely asserting, as he does here, that one of his prior felony conviction is no longer  
23 defined as a “felony drug offense” and therefore does not qualify for the purpose of sentence  
24 enhancement under 21 U.S.C. § 851 and § 841(b). *See Clearman v. Norwood*, No. 2:07-00023-  
25 AG-JWJ (C.D. Cal. Feb. 26, 2007) (construing Petitioner’s petition for writ of habeas corpus  
26 under 28 U.S.C. § 2241 as a motion pursuant to § 2255, and transferring case to WDMO); *See*

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28 <sup>2</sup> The undersigned cites to the record in Petitioner’s underlying WDMO criminal case as “Crim. Doc. No.  
—.”.

1 *Clearman v. United States*, No. 07-cv-00187-CV-W-DW (W.D. Mo. Mar. 16, 2007) (denying §  
2 2255 motion as unauthorized successive claim); *Clearman v. United States*, No. 07-2051 (8th Cir.  
3 2007) (affirming denial of unauthorized successive claim); Crim Doc. No. 1021 (denying  
4 Petitioner’s motion for relief pursuant to FRCP 60(b)(6) filed in 2012 because Petitioner is  
5 “seeking to collaterally attack his sentence and thus his motion amounts to a successive § 2255  
6 motion”); Crim. Doc. Nos. 1027, 1036, 1038 (denying Petitioner’s motion to reduce his sentence  
7 under U.S.C. § 3582(c) as he failed to provide any statutory authority that would permit the  
8 district court to modify his final sentence).

9 Most recently, with appointed counsel, Petitioner filed an amended motion for  
10 compassionate release under § 3582 in the WDMO court of conviction on March 26, 2021. Crim.  
11 Doc. No. 1049. Petitioner argued that pursuant to the First Step Act, the mandatory minimum  
12 sentence he would face under § 841(b)(1)(A) upon the filing of a § 851 notice is 25 years, and his  
13 “prior California conviction for possession of cocaine no longer qualifies as a predicate offense  
14 for a number of reasons: the offense did not include any intent to distribute, manufacture, or  
15 deliver a controlled substance; [Petitioner] did not serve at least 12 months in custody for the  
16 offense; the offense has been reclassified by the state of California as a misdemeanor offense.”  
17 *Id.* The WDMO court of conviction denied the motion on the merits, specifically finding “there  
18 is no legal basis for amending Defendant’s sentence when changes in sentencing laws are not  
19 retroactive”; and the Eighth Circuit affirmed. Crim. Doc. Nos. 1055, 1059.

## 20 **II. APPLICABLE LAW AND ANALYSIS**

### 21 **A. § 2241 Petition**

22 Generally, a § 2241 petition is reserved for federal prisoners challenging “the manner,  
23 location, or conditions of a sentence’s execution.” *Harrison v. Ollison*, 519 F.3d 952, 956 (9th  
24 Cir. 2008). Federal prisoners seeking to challenge the legality of their confinement must do so  
25 through a § 2255 motion. *See Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012). In limited  
26 circumstances, federal prisoners may challenge the legality of their confinement through a § 2241  
27 petition by utilizing the so-called “savings clause” or “escape hatch” provision of § 2255(e). *Id.*  
28 at 1192. This portal permits a federal prisoner to challenge the legality of confinement if he can

1 establish that the remedy provided under § 2255 is “inadequate or ineffective to test the legality  
2 of his detention.” 28 U.S.C. § 2255(e). To demonstrate a remedy is “inadequate or ineffective” a  
3 petitioner must: (1) make a claim of actual innocence, and (2) show that he has not had an  
4 “unobstructed procedural shot at presenting that claim.” *Shepherd v. Unknown Party, Warden,*  
5 *FCI Tucson*, 54 F.4th 1075, 1076 (9th Cir. 2021). A prisoner cannot circumvent the limitations  
6 imposed on successive petitions by restyling his petition as one under § 2241. *Stephens v.*  
7 *Herrera*, 464 F.3d 895, 897 (9th Cir. 2006); *Moore v. Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999)  
8 (per curiam) (petitioner attempted to circumvent AEDPA’s successive motion provisions by  
9 bringing § 2255 claims in a § 2241 petition).

10 A factual claim of actual innocence requires a petitioner to “demonstrate that, in light of  
11 all the evidence, it is more likely than not that no reasonable juror would have convicted him.”  
12 *Stephens*, 464 F.3d at 898 (citing *Bousley v. United States*, 523 U.S. 614 (1998)). Here, Petitioner  
13 does not dispute the validity of his underlying conviction for conspiracy to distribute PCP.  
14 Instead, Petitioner relies on *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020) as support for his  
15 contention that he is actually innocent because at the time of his sentencing the Eighth Circuit had  
16 not “yet adopted . . . a criterion used to reduce some offenses known as wobblers from [a] felony  
17 offense to a misdemeanor,” and therefore his predicate “wobbler” offense no longer qualifies as a  
18 “serious drug offense” for mandatory sentence enhancement under 21 U.S.C. § 841(b) and  
19 § 851.<sup>3</sup> (Doc. No. 1 at 3, 7). Petitioner also argues the prior state offense “was rendered to be a  
20 misdemeanor” at the time of sentencing because he was sentenced to 90 days in jail, a fine, and  
21 probation; and his prior offense is now classified “strictly” as a misdemeanor. (*Id.* at 7-9; Doc.  
22 No. 12 at 10); *See* Cal. Health & Safety Code § 11350(a) (every person convicted of the offense

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23 <sup>3</sup> “Under California law, certain offenses may be classified as either felonies or misdemeanors. These  
24 crimes are known as “wobblers.” . . . [A] ‘wobbler’ is presumptively a felony and remains a felony except  
25 when the discretion is actually exercised to make the crime a misdemeanor.” *Ewing v. California*, 538  
26 U.S. 11, 16-17 (2003). To the extent discernable, it appears the “criterion” Petitioner argues was  
27 “adopted” by the Eighth Circuit references California Penal Code § 17(b), which sets out guidance for how  
28 a “wobbler” offense may be classified. *See United States v. Atkins*, 2017 WL 2652873, at \*4 (N.D. Cal.  
June 19, 2017) (California Penal Code § 17(b) “permits the conviction to be ‘wobbled’ down to a  
misdemeanor” in accordance with certain terms); *United States v. Diaz-Argueta*, 564 F.3d 1047, 1049-50  
(9th Cir. 2009) (California Penal Code § 17(b) “distinguishes between misdemeanor and felony  
convictions under wobbler statutes”).

1 “shall be punished by imprisonment in a county jail of not more than one year”).

2       However, as noted by Respondent, “[i]n *Allen*, the Ninth Circuit found that Petitioner  
3 Allen ‘ha[d] made a claim of actual innocence that permits jurisdiction over his § 2241 petition’  
4 because Petitioner Allen showed ‘retroactive’ [Supreme Court] cases . . . rendered his prior state  
5 conviction non-qualifying for sentence enhancement.” (Doc. No. 7 at 5 (citing *Mathis v. United*  
6 *States*, 579 U.S. 500 (2016), and *Descamps v. United States*, 570 U.S. 254 (2013))). Here, in an  
7 attempt to support his argument that his predicate conviction no longer qualifies as a “serious  
8 drug felony” such that it would qualify for sentence enhancement under § 841(b) and § 851,  
9 Petitioner cites a string of Eighth Circuit cases decided after his direct appeal and initial § 2255  
10 motion that he claims “utilize[] California’s Cal. Penal Code §17 to validate prior California’s  
11 [sic] State conviction for enhancement of sentence purposes.” (Doc. No. 1 at 10-11 (citing, *e.g.*,  
12 *United States v. Gomez-Hernandez*, 300 F.3d 974, 978 (8th Cir. 2002) (affirming district court  
13 conclusion that defendant’s prior conviction was a felony under California law on direct appeal);  
14 *United States v. Vieczas-Soto*, 562 F.3d 903 (8th Cir. 2009) (finding on direct appeal that  
15 government failed to prove by preponderance of the evidence that defendant’s prior offense was a  
16 felony because it was converted to a misdemeanor within the meaning of Cal. Penal Code  
17 § 17(b), and remanding for resentencing); *United States v. Adams*, 716 F.3d 1066 (8th Cir. 2013)  
18 (affirming on direct appeal that prior convictions for wobbler offenses qualified as felonies under  
19 the Armed Career Criminal Act because the convictions did not result in judgment and neither  
20 court declared them to be misdemeanors); *United States v. McPherson*, 2017 WL 2879794 (N.D.  
21 Ia. July 6, 2017) (denying motion to dismiss indictment because predicate “wobbler” offense  
22 constitutes a felony for the purposes of §922(g)(1)).

23       Here, Petitioner fails to cite retroactive federal law that would render his prior conviction  
24 under a California “wobbler” statute non-qualifying for sentence enhancement under  
25 § 841(b) and § 851 on collateral review. Moreover, to the extent Petitioner relies on a subsequent  
26 reclassification of his predicate offense from a felony to “strictly” a misdemeanor, it is well-  
27 settled that a prior conviction qualifies as a “felony drug offense” for the purposes of sentence  
28 enhancement under 21 U.S.C. § 841(b) if it was punishable as a felony at the time of conviction.

1 See *United States v. Santillan*, 944 F.3d 731, 733-34 (8th Cir. 2019) (citing *United States v.*  
2 *Davis*, 838 F.3d 968, 973-74 (9th Cir. 2016) (“the question posed by § 841(b)(1)(A) is whether  
3 the defendant was previously convicted, not the particulars of how state law later might have  
4 permitted relief from the defendant’s state conviction.”)). As argued by Respondent, “Petitioner  
5 fails his burden to establish post-1992 retroactive state and or federal law changed the elements  
6 for his 1981 California state felony offense *nunc pro tunc* for purposes of 21 U.S.C. § 841(b) and  
7 § 851 application. Even if present day criminal offenders (with similar prior state felony  
8 conviction) may not suffer similar sentencing enhancement under 21 U.S.C. § 841(b) and § 851,  
9 Petitioner fails his burden to show his 1981 conviction has retroactively been converted to a non-  
10 qualifying felony for purposes of 21 U.S.C. § 841(b) and § 851 sentencing enhancement.” (Doc.  
11 No. 7 at 6). Consequently, Petitioner fails to make a claim of actual innocence as required by the  
12 escape hatch provision of § 2255(e).

13 Petitioner additionally argues he has not had an unobstructed procedural shot to raise his  
14 claim because “supporting precedence [sic] in the district of conviction ([Eighth Circuit]) became  
15 available after movants [sic] direct appeal in 1993, and after movants [sic] § 2255 in 1998.”  
16 (Doc. No. 1 at 9 (referencing case law cited *supra*)). However, because Petitioner has failed to  
17 demonstrate he is actually innocent, the Court need not address the “unobstructed procedural  
18 shot” prong of the escape hatch. See *Wilson v. Thompson*, 2022 WL 815334, at \*4 (E.D. Cal.  
19 Mar. 17, 2022) (citing *Nichols v. Ciolli*, 2021 WL 3563092, at \*3 (E.D. Cal. Aug. 12, 2021));  
20 *Renderos v. Langford*, 2019 WL 1789879, at \*4 (C.D. Cal. Apr. 24, 2019); *Nguyen v. Babcock*,  
21 2012 WL 3756864, at \*2 (E.D. Cal. Aug. 28, 2012) (“The court need not address whether  
22 petitioner had an unobstructed procedural shot at pursuing his claim because, even assuming that  
23 he did not, he has failed to show that he is actually innocent.”). Moreover, as discussed *supra*, the  
24 Eighth Circuit has considered, and denied, multiple post-conviction challenges by Petitioner  
25 asserting a similar version of the argument that his “wobbler” state law conviction should not  
26 qualify as a predicate felony offense for the purpose of enhanced sentencing under 21 U.S.C. §  
27 841(b) and § 851.

28 Based on the foregoing, Petitioner has failed to satisfy the escape hatch criteria of § 2255,

1 and this court lacks jurisdiction over the § 2241 petition. Because Petitioner has not been granted  
2 leave by the Court of Appeals to file a successive § 2255 motion, it would be futile to transfer the  
3 § 2241 petition to the WDMO court of conviction for consideration as a § 2255 motion.

4 Accordingly, it is **ORDERED**:

- 5 1. Respondent's Motion to Dismiss (Doc. No. 7) is GRANTED and the Petition is  
6 DISMISSED.
- 7 2. The Clerk of Court is directed to terminate any pending motions and close this case.

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Dated: May 22, 2023

  
HELENA M. BARCH-KUCHTA  
UNITED STATES MAGISTRATE JUDGE