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

JAMES ROY BARRON, JR.,

Petitioner,

No. CIV S-11-0639 GGH (TEMP) P

vs.

KUMA J. DEBOO,

Respondent.

ORDER¹

_____ /

On April 25, 2011, the court ordered petitioner to show cause why this action should not be dismissed as successive pursuant to 28 U.S.C. § 2255(h). In addition to the reasons set forth in the court’s April 25, 2011 order, the added citation of Gilbert v. United States, __ F.3d __, 2011 WL 1885674 (11th Cir. 2011) (en banc) demonstrates why the “savings clause” of § 2255(e) would not apply to petitioner’s argument that he is entitled to proceed by way of § 2241. Simply because sentencing laws have lessened over the years in their severity does not mean that petitioner may now proceed by way of § 2241 because the remedy afforded by § 2255 is no longer available or effective to vacate the allegedly excessive sentence. Nor is petitioner actually innocent such that he can proceed by way of the exception set forth in § 2255(h) because the sentencing laws have relaxed. See Alaimedo v. United States, 636 F.3d

¹Petitioner is proceeding pursuant to 28 U.S.C. § 636(c) (consent to having the undersigned preside).

1 1092, 1096 (9th Cir. 2011) (To establish actual innocence for the purposes of habeas relief, a
2 petitioner “must demonstrate that, in light of all the evidence, it is more likely than not that no
3 reasonable juror would have convicted him.” Stephens, 464 F.3d at 898 (quoting Bousley v.
4 United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)). A petitioner is
5 actually innocent when he was convicted for conduct not prohibited by law. See Reyes–Requena
6 v. United States, 243 F.3d 893, 904 (5th Cir.2001) (summarizing the tests employed by the
7 circuit courts to determine actual innocence). Finally, the change to crack cocaine sentencing
8 policies is not a new rule of *constitutional* law as required by § 2255(h).

9 Accordingly,

10 IT IS HEREBY ORDERED that petitioner’s application for writ of habeas corpus
11 is dismissed without prejudice to petitioner seeking permission in the Ninth Circuit Court of
12 Appeals to file a second motion attacking his sentence under 28 U.S.C. § 2255.

13 DATED: May 30, 2011

14 /s/ Gregory G. Hollows

15 _____
16 GREGORY G. HOLLOWES
UNITED STATES MAGISTRATE JUDGE

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