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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Juan Deshannon Butler, Petitioner, vs. Becky Clay, Warden, Respondent.	CV 12-00801-TUC-DCB(JR) RETURN AND ANSWER TO ORDER TO SHOW CAUSE WHY PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241 SHOULD NOT BE GRANTED

Respondent Becky Clay, Warden at the Federal Correctional Institution, Tucson, AZ (FCI-Tucson), by and through her undersigned attorneys, returns and answers the order to show cause why Petitioner Juan Deshannon Butler's ("Petitioner") petition for writ of habeas corpus should not be granted and requests that the Court deny and dismiss the petition based upon the accompanying memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

In this habeas action under 28 U.S.C. § 2241, Petitioner Juan Deshannon Butler challenges the sentence imposed in his conviction in the Northern District of Oklahoma in 2006 for a violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). He is serving a 180

month sentence. *See* attached Exhibit 1, Judgment in a Criminal Case. This Court summarized Petitioner's relevant previous habeas filings in N.D. Oklahoma and the 10th Circuit as follows:

> On September 10, 2008, Petitioner filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. In a January 23, 2009 Order, the trial court dismissed the § 2255 motion as untimely. In a February 25, 2009 Order, the trial court denied his motion to reconsider. On July 30, 2009, the Tenth Circuit denied Petitioner's request for a certificate of appealability. In an October 1, 2012 Order, the Tenth Circuit denied Petitioner's request for authorization to file a second or successive § 2255 motion.

Federal prisoners challenging their convictions or sentences may obtain relief under 28 U.S.C. § 2241 only in limited circumstances, because that statute has been supplanted, for the most part, by 28 U.S.C. § 2255. "In general, § 2255 provides the exclusive procedural mechanism by which a federal prisoner may test the legality of his detention." *Lorentsen v. Hood*, 223 F.3d 950, 953 (9th Cir. 2000); *see also Alaimalo v. United States*, 645 F.3d 1042, 1046 (9th Cir. 2011).

The limited exception to this principal derives from § 2255(e), which states:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply 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.*

28 U.S.C. § 2255(e) (emphasis added). This provision, variously referred to as the "savings clause" or the "escape clause," allows a federal prisoner to seek relief if, and only if, "the § 2255 motion is inadequate or ineffective to test the legality of his detention." *Moore v. Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999).

Section 2255 is not "inadequate or ineffective" merely because a prisoner is

procedurally barred from bringing a Section 2255 motion by the gate-keeping rules applicable to such petitions, *Lorentsen*, 223 F.3d at 953, or because the sentencing court already has denied the prisoner relief on the merits. *Tripati v. Henman*, 843 F.2d 1160, 1162 (9th Cir. 1988). Rather, a prisoner may proceed under 28 U.S.C. § 2241 only if he "(1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." *Alaimalo*, 645 at 1047 (*quoting Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006)). To establish actual innocence a prisoner must demonstrate that, in light of all of the evidence, it is more likely than not that no reasonable juror would have convicted him. *Id*. A prisoner also is actually innocent where he has been convicted for conduct the law does not prohibit. *Id*. Moreover, the availability of the escape clause is further limited by 28 U.S.C. § 2255(h), which permits a prisoner to tender a second or successive § 2255 motion in the case of either newly discovered evidence that would vitiate a finding of guilt, or a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court.

1. Actual Innocence

Initially, it should be noted – as this Court recognized in its screening order – sentencing enhancement is generally not recognized under the escape clause. *Marrero v. Ives*, 682 F.3d 1190, 1193-94 (9th Cir. 2012), *cert. denied*, 133 S.Ct. 1264 (2013). Petitioner is not "actually innocent" and does not claim to be. He challenges the sentencing enhancement provision of 18 U.S.C. § 924(e)(1) (the Armed Career Criminal Act (ACCA)) which provides for mandatory imposition of a 15-year sentence if the offender has three prior violent felony convictions. Petitioner contends that his "walk away" escape is not a "violent felony" as defined in § 924(e)(2)(B), citing *Chambers v. United States*, 555 U.S. 122, 129 S.Ct. 687 (2009), and *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581 (2008). *Chambers* held that a "failure to report" escape was not a violent felony under the ACCA. *Begay* held that the New Mexico felony driving under the influence of alcohol (DUI) offense was not a violent felony.

However, in *Sykes v. United States*, ____ U.S. ____ , 131 S.Ct. 2267 (2011), the Court held that the Indiana intentional vehicular flight from a law enforcement officer was a violent felony. The Court noted that using the "categorical approach," it does not matter if there may be non-violent factual scenarios that could be envisioned under the particular crime. The essential consideration is whether the elements of the offense, escape in this case, would justify its inclusion in the residual clause of § 924(e)(2)(B) ("otherwise involves conduct that presents a serious potential risk of physical injury to another"). In the Tenth Circuit at the time Petitioner was sentenced, every escape was considered a "violent felony" under the ACCA. *United States v. Moudy*, 132 F.3d 618, 620 (10th Cir. 1998):

> [E]very escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious potential to do so. A defendant who escapes from a jail is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently, violence could erupt at any time. Indeed, even in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody.

Moudy at 620, *quoting United States v Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994). However, since *Chambers*, 555 U.S. 122, the Tenth Circuit has acknowledged that it needs to reevaluate its categorical "every escape" approach to the ACCA violent felony analysis. *United States v. Charles*, 576 F.3d 1060, 1068 (10th Cir. 2009). The Ninth Circuit, even prior to *Chambers*, employed a modified categorical analysis, at least with regard to escapes involving walk-aways from a half-way house. *United States v. Piccolo*, 441 F.3d 1084, 1088 (9th Cir. 2006). Then in *United States v. Savage*, 488 F.3d 1232 (9th Cir. 2007), the Ninth Circuit upheld an ACCA sentence where the defendant contended that his prior escape conviction was not a violent felony because he escaped by sneaking through a hole in the fence when no one was looking.

In Petitioner's case it is not clear at all whether his escape was a "walk-away" escape from a facility similar to half-way house. As is clear from *Savage*, an escape from a jail or detention center constitutes a violent crime under the ACCA, even if the escape was not detected. There is nothing in the record, other than Petitioner's allegations that he merely "walk[ed] away], to establish that Petitioner was at a half-way house or similar facility where there were no guards who had a duty to apprehend him if they realized he was escaping. *See Savage*, 488 F.3d at 1236. Moreover, the Supreme Court's recent decision in *Descamps v. United States*, ____ U.S. ____ , 133 S.Ct. 2276 (2013), makes clear that a "modified' categorical analysis utilized by the Ninth Circuit could not be used where the statute at issue was "indivisible." Here Petitioner points to nothing in the record to show whether Petitioner's prior escape was "divisible" such that the elements of his escape conviction may have amounted to something less than a generic escape.

Finally, as was pointed out in *Marrero v. Ives*, 682 F.3d at 1193-94, Petitioner's claims regarding his sentencing are not claims of actual innocence falling within the purview of § 2255's escape clause. To the extent Petitioner may be claiming that he was statutorily ineligible for the sentence he received, that is certainly undercut by the state of 10th Circuit law at the time he was sentenced as discussed above.

2. Unobstructed procedural shot at presenting his claim

Not only has Petitioner failed to show that he is actually – factually – innocent, he has had an unobstructed procedural shot at presenting his claim. The Supreme Court decision in *Begay* was issued on April 16, 2008. Plaintiff's first § 2255 petition was filed in September 2008. It was still pending when *Chambers* was decided on January 13, 2009. The district court rejected his petition on January 23, 2009. See attached Exhibit 2, Order, Jan. 23, 2009, No. 05-CR-0004-CVE. Petitioner's request to the 10th Circuit for a certificate of appealability was denied on July 30, 2009. *United States v. Butler*, 329 Fed. Appx. 851 (10th Cir. 2009) (Unpublished). Petitioner then filed a motion under Fed. R. Crim. P. 36 to make changes to his criminal judgment. In rejecting his appeal in that case in which he sought reexamination of the circuit's position that all escapes are violent

felonies, that court noted his untimeliness:

> Butler's case is, however, not the right vehicle for such a reexamination. Butler's failure to argue this issue before the district court, despite the availability of the relevant Supreme Court cases, renders him unable to pursue this general argument now.

Order and Judgment, 10th Circuit Court of Appeals, No. 12-5050, August 22, 2012, 2012 WL 3590880, p 8.

Petitioner then requested authorization from the Tenth Circuit Court of Appeals to file a second or successive § 2255 petition. The 10th Circuit denied that request, again pointing out that the *Begay* decision on which he relied was issued five months before he filed his first § 2255 petition. (Petitioner's attachment A, Order, 10th Circuit Court of Appeals, Oct. 1, 2012, p.2.)

Accordingly, Petitioner had an unobstructed procedural opportunity to present the claims he now wants this Court to consider.

3. No newly discovered evidence or new rule of constitutional law

A further qualification on a successive § 2255 petition is that § 2255(h) only permits a prisoner to tender a second or successive § 2255 motion in the case of either newly discovered evidence that would vitiate a finding of guilt, or a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. Petitioner makes no claim that there is any newly discovered evidence. As to a new rule of constitutional law, the 10th Circuit pointed out that *Begay* "announced a rule of statutory construction, not constitutional law, *see Begay*, 553 U.S. at 141-148; and the Supreme Court has not made it retroactively applicable to cases on collateral review[.]" (citation and quote omitted.) (Petitioner's attachment A, Order, 10th Circuit Court of Appeals, Oct. 1, 2012, p.2.) Thus Petitioner cannot satisfy this statutory prerequisite for filing a successive § 2255 petition.

For the reasons set forth above, Petitioners petition for habeas review under § 2241 should be denied and his petition dismissed.

Respectfully submitted,

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s/Gerald S. Frank
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Copy of the foregoing mailed by U.S. mail this 18th day of July, 2013, to:

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