

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

APR 20 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PETER GEORGE NOE,

No. 17-56492

Petitioner-Appellant,

D.C. No. 2:17-cv-01574-AB-AS
Central District of California,
Los Angeles

v.

WARDEN OF VICTORVILLE,

ORDER

Respondent-Appellee.

Before: McKEOWN and N.R. SMITH, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the [disguised section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Harrison v. Ollison*, 519 F.3d 952, 958 (9th Cir. 2008); *Porter v. Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001) (order).

Any pending motions are denied as moot.

DENIED.

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION
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11 PETER GEORGE NOE,) Case No. CV 17-01574-AB (AS)
12)
12) Petitioner,) REPORT AND RECOMMENDATION OF
13)
13) v.) UNITED STATES MAGISTRATE JUDGE
14)
14 Warden, USP VICTORVILLE,)
15)
15) Respondent.)
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16 _____)
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18 This Report and Recommendation is submitted to the Honorable
19 Andre Birotte, Jr., United States District Judge, pursuant to 28
20 U.S.C. § 636 and General Order 05-07 of the United States District
21 Court for the Central District of California. For the reasons
22 discussed below, it is recommended that this action be dismissed
23 without prejudice.
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1 I. INTRODUCTION

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3 On February 27, 2017, Peter George Noe ("Petitioner"), a
4 federal prisoner proceeding pro se, filed a "Memorandum of Law in
5 Support of Petition for Writ of Habeas Corpus Under 28 U.S.C. §
6 2241 Pursuant to the Savings Clause of 28 U.S.C. § 2255(e)" (Docket
7 Entry No. 2), which the Court construed as a Petition for Writ of
8 Habeas Corpus by a Person in Federal Custody pursuant to 28 U.S.C.
9 § 2241 ("Petition"). (See Docket Entry No. 5 at 1).¹ On the same
10 date, Petitioner filed a Motion for Leave to File a Supplemental
11 Brief, with an attached "Supplemental Brief in Support of Motion
12 Under § 2241" ("Supplemental Brief") (Docket Entry No. 3), which
13 the Court granted. (See Docket Entry No. 5 at 2 n.2).

14
15 Petitioner, who was convicted in the United States District
16 Court for the District of Minnesota of conspiracy to distribute
17 methamphetamine, in violation of 21 U.S.C. §§ 841(b)(1)(A), 846,
18 and 851, and conspiracy to distribute marijuana, in violation of 21
19 U.S.C. §§ 841(b)(1)(B), 846, and 851 (see Docket Entry No. 11,
20 Declaration of Agustin D. Orozco ["Orozco Decl."], ¶ 2, Exhibit "A"
21 [the Judgment reflects that the charges were alleged in a
22 Superseding Indictment]) challenges his sentence. (Petition at 6-

23
24 ¹ On the same date, Petitioner filed an "Ex Parte Motion to
25 File 28 U.S.C. § 2241 Petitioner Nunc Pro Tunc" (Docket Entry No.
26 1), seeking to have the Petition deemed constructively filed on
27 February 5, 2014 pursuant to Houston v. Lack, 487 U.S. 266, 273
(1988). On March 2, 2017, the Court denied Petitioner's ex parte
application without prejudice because the timeliness of the
Petition was not at issue. (See Docket Entry No. 5 at 2, n.1).

18; Supplemental Brief at 6-13; see also Opposition at 2).²

On April 3, 2017, Respondent filed a Motion to Dismiss or Transfer the Petition ("Motion"), contending that (a) the Petition is a disguised motion under 28 U.S.C. § 2255 over which the Court does not have jurisdiction, and (b) Petitioner was not in the custody of the United States District Court for the Central District of California at the time the Petition was filed. (Docket Entry No. 11).³

² The Petition raises the following claims for federal habeas relief: (1) "Petitioner [is] actually innocent of sentence where Supreme Court ruling in Descamps v. United States [133 S.Ct. 2276] invalidates 851 enhancement predication of state conviction. Sixth and Eighth Amendment violations."; (2) "Petitioner is actually innocent of underlying offense where new Supreme Court ruling in Descamps v. United States and Ninth Circuit precedent in United States v. Gonzalez-Reyes [535 Fed.Appx. 592 (9th Cir. 2013)] determine that state prior used as § 851 predicate is not a drug trafficking offense in violation of Fifth and Sixth Amendments."; (3) "Denial of effective assistance of counsel when suppressed evidence was presented at trial by the government and allowed by the court. Sixth Amendment violation." (There appear to be three additional ineffective assistance subclaims: (a) "Ineffective assistance of counsel when trial counsel fail[ed] to call witnesses on 'gang evidence' and 'fire arms' [sic]."; (b) Ineffective assistance of counsel when trial lawyer fail[ed] to inform [Petitioner] of his true sentence exposure."; and (c) "Trial counsel sexually assaulted [Petitioner's] co-defendant's mother."); and (4) Under Molina-Martinez v. United States, 136 S.Ct. 1338 (2016), the Eighth Circuit Court of Appeals erred in applying a harmless error standard, rather than a plain error standard, to its determination about the district court's sentencing error under Booker v. United States, 543 U.S. 220 (2005). (Petition at 6-18; Supplemental Brief at 6-13).

³ The Court's determination that the Petition is actually a disguised § 2255 motion over which the Court does not have jurisdiction renders it unnecessary to address Respondent's second
(continued...)

1 On May 15, 2017, Petitioner filed a Traverse to the Motion
2 ("Opposition"). (Docket Entry No. 20).
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4 For the reasons discussed below, the Court recommends that the
5 Petition be dismissed without prejudice for lack of jurisdiction.
6

7 II. PROCEDURAL BACKGROUND 8

9 Petitioner was charged in an Indictment filed in the United
10 States District Court for the District of Minnesota with one count
11 of conspiracy to distribute methamphetamine in violation of 21
12 U.S.C. §§ 841(b) (1) (A), 846, and 851, and one count of conspiracy
13 to distribute marijuana in violation of 21 U.S.C. §§ 841(b) (1) (B),
14 846, and 851.⁴
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18 ³(...continued)
19 contention. Moreover, since the Court is dismissing the Petition
20 based on the lack of jurisdiction, the Court will not address
21 Respondent's additional contention that the Petition should be
22 dismissed as untimely and successive (see Motion at 13-15).
23

24 ⁴ The Court takes judicial notice of the records of the
25 United States District Court for the District of Minnesota and the
26 United States Court of Appeals for the Eighth Circuit available on
27 the PACER database. See Mir v. Little Company of Mary Hosp., 844
28 F.2d 646, 649 (9th Cir. 1988) (court may take judicial notice of
court records).

As noted above, the two counts for which Petitioner was
found guilty were alleged in a Superseding Indictment.

1 On June 9, 2003, following a trial,⁵ a jury found Petitioner
2 guilty of one count of conspiracy to distribute methamphetamine in
3 violation of 21 U.S.C. §§ 841(b)(1)(A), 846, and 851, and one count
4 of conspiracy to distribute marijuana in violation of 21 U.S.C. §§
5 841(b)(1)(B), 846, and 851.⁶ On October 30, 2003, the district
6 court sentenced Petitioner to a term of imprisonment for 480
7 months.⁷ See United States v. Noe, 411 F.3d 878, 883 (8th Cir.
8 2005); United States v. Noe, 2007 WL 4562507, *1-*2 (D. Minn. Dec.
9 20, 2007); see also Motion, Orozco Decl., ¶¶ 3-4, Exhibit "A",
10 Exhibit "B" at i, Exhibit "C" at 2.

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12
13 ⁵ Petitioner was jointly tried with one co-defendant,
14 Timothy Schultz. Three other co-defendants pled guilty prior to
15 trial.

16 ⁶ 21 U.S.C. § 851(a)(1) provides in pertinent part that:
17 "No person who stands convicted of an offense under this part shall
18 be sentenced to increased punishment by reason of one or more
19 convictions, unless before trial, or before entry of a plea of
20 guilty, the United States attorney files an information with the
21 court (and serves a copy of such information on the person or
22 counsel for the person) stating in writing the previous convictions
to be relied upon." 21 U.S.C. § 851(d)(1) provides that: "If the
person files no response to the information, or if the court
determines, after hearing, that the person is subject to increased
punishment by reason of prior convictions, the court shall proceed
to impose sentence upon him as provided by this part."

23 ⁷ Petitioner alleges that the trial court enhanced
24 Petitioner's sentence under 21 U.S.C. § 851 based on Petitioner's
25 prior conviction under Minn. Stat. § 152.021 subdivision 1(1). (See
26 Petition at 3, 7). Neither party has provided the Court with any
27 records to substantiate the nature of Petitioner's prior conviction
upon which his sentence was enhanced. For purposes of its
analysis, the Court will assume Petitioner's sentence was enhanced
based on his prior conviction under Minn. Stat. § 152.021
subdivision 1(1).

1 On June 5, 2005, the Eighth Circuit Court of Appeals affirmed
2 Petitioner's convictions and sentence. See United States v. Noe,
3 411 F.3d 878 (8th Cir. 2005).
4

5 On February 19, 2007, Petitioner filed a motion to vacate, set
6 aside or correct the sentence pursuant to 28 U.S.C. § 2255 in the
7 United States District Court for the District of Minnesota. On
8 December 20, 2007, the district court denied Petitioner's § 2255
9 motion, and granted Petitioner a certificate of appealability with
10 respect to his dual representation and conflict of interest claim
11 (but declined to issue a certificate of appealability with respect
12 to any other claim). See Noe v. United States, Case No. CV 07-
13 01207-JMR, United States District Court, District of Minnesota,
14 Docket Nos. 1-2, 5-6; see also United States v. Noe, Case No. CR
15 03-00008-FLN, United States District Court, District of Minnesota,
16 Docket Nos. 270-71, 285-86.
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18 On April 8, 2010, the Eighth Circuit Court of Appeals affirmed
19 the district court's denial of Petitioner's § 2255 motion, affirmed
20 the Judgment, and declined to expand the certificate of
21 appealability. See Noe v. United States, 601 F.3d 784 (2010).
22

23 Petitioner made the following attempts to obtain authorization
24 from the Eighth Circuit Court of Appeals to file a second or
25 successive § 2255 motion:
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1 (1) On May 3, 2011, Petitioner filed a petition to file a
2 second or successive § 2255 motion, which was denied on July 11,
3 2011. See Noe v. United States, Case No. 11-1987, Eighth Circuit
4 Court of Appeals, Docket Nos. 2, 7.

5
6 (2) On March 25, 2013, Petitioner filed a petition to file a
7 second or successive § 2255 motion, which was denied on July 31,
8 2013. See Noe v. United States, Case No. 13-1683, Eighth Circuit
9 Court of Appeals, Docket No. 2, 7.

10
11 (3) On March 10, 2014, Petitioner filed a petition to file a
12 second or successive § 2255 motion, which was denied on June 2,
13 2014. See Noe v. United States, Case No. 14-1564, Eighth Circuit
14 Court of Appeals, Docket Nos. 2, 7.

15
16 (4) On April 18, 2016, Petitioner filed a petition to file a
17 second or successive § 2255 motion, which was denied on May 13,
18 2016. See Noe v. United States, Case No. 16-1942, Eighth Circuit
19 Court of Appeal, Docket Nos. 2, 7.

20
21 (5) On March 17, 2017 (after the filing of the instant
22 Petition), Petitioner filed a petition to file a second or
23 successive § 2255 motion, which was denied on April 13, 2017. See
24 Noe v. United States, Case No. 17-1489, Docket Nos. 1, 9.

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III. DISCUSSION

A federal prisoner who contends that his or her conviction or sentence is subject to collateral attack "may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. "Generally, motions to contest the legality of a sentence must be filed under § 2255, while petitions that challenge the manner, location, or conditions of a sentence's execution must be brought pursuant to § 2241 in the custodial court." Hernandez v. Campbell, 204 F.3d 861, 864 (9th Cir. 2000) (citations and footnote omitted). A prisoner generally may not substitute a habeas petition under 28 U.S.C. § 2241 for a § 2255 motion.

An application for a writ of habeas corpus on 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; see Stephens v. Herrera, 464 F.3d 895, 897-99 (9th Cir. 2006); Hernandez, 204 F.3d at 864-65.

1 "Under the savings clause of § 2255, however, a federal
2 prisoner may file a habeas corpus petition pursuant to § 2241 to
3 contest the legality of a sentence where his remedy under § 2255 is
4 'inadequate or ineffective to test the legality of his detention.'"
5 Hernandez, supra; see also Stephens, 464 F.3d at 897. This
6 "savings clause" exception to § 2255 exclusivity is a "narrow"
7 exception. Ivy v. Pontesso, 328 F.3d 1057, 1059-60 (9th Cir.
8 2003). Mere lack of success in the sentencing court does not
9 make the § 2255 remedy "inadequate or ineffective." Boyden v.
10 United States, 463 F.2d 229, 230 (9th Cir. 1972). If the rule were
11 otherwise, every disappointed prisoner/movant incarcerated in a
12 district different from the sentencing district could pursue a
13 repetitive § 2241 petition in the district of incarceration.

14
15 Similarly, neither the enforcement of the statute of
16 limitations nor the enforcement of restrictions on successive
17 § 2255 motions renders the § 2255 remedy "inadequate or
18 ineffective" within the meaning of the statute. See United States
19 v. Lurie, 207 F.3d 1075, 1077 (8th Cir. 2000) (the possibility that
20 a § 2255 remedy, once available, now may be barred by the
21 applicable statute of limitations does not render the § 2255 remedy
22 "inadequate or ineffective"); Moore v. Reno, 185 F.3d 1054, 1055
23 (9th Cir. 1999) (dismissal of a § 2255 motion as successive does not
24 render the § 2255 remedy "ineffective or inadequate"). The savings
25 clause does apply, however, when a petitioner demonstrates both
26 "actual innocence" and the lack of an "unobstructed procedural
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1 shot" at presenting the petitioner's claims. See Harrison v.
2 Ollison, 519 F.3d 952, 959 (9th Cir. 2008); Stephens, 464 F.3d at
3 898. In order to "establish actual innocence, [P]etitioner must
4 demonstrate that, in light of all the evidence, it is more likely
5 than not that no reasonable juror would have convicted him."
6 Bousley v. United States, 523 U.S. 614, 623 (1998) (citation and
7 quotations omitted); see Stephens, supra. "[T]he issue is 'factual
8 innocence, not mere legal insufficiency.'" Lorentsen v. Hood, 223
9 F.3d 950, 954 (9th Cir. 2000) (quoting Bousley, supra).

10
11 Here, Petitioner's claims are confined to the legality of his
12 detention, specifically, a challenge to the sentence that was
13 imposed for his convictions. Thus, Petitioner may only proceed
14 with the instant federal petition under § 2241 if he can make a
15 claim of actual innocence and establish that he has not had an
16 unobstructed shot at presenting that claim under the savings clause
17 in 28 U.S.C. § 2255.

18
19 Petitioner asserts, in his Opposition, that he has raised in
20 the Petition and/or Supplemental Brief three distinct claims of
21 actual innocence, specifically: (1) "Petitioner['s] claims are that
22 the Supreme Court['s] ruling in Descamps v. United States 133 S.Ct.
23 2276[] rendered his sentence in excess of the statutory maximum.";
24 (2) Petitioner's sentence was in excess of the statutory maximum,
25 pursuant to Molina-Martinez v. United States, 136 S.Ct. 1338
26 (2016), Peugh v. United States, 133 S.Ct. 2072 (2012), and United

1 States v. Booker, 543 U.S. 220 (2005); and (3) Petitioner is
2 actually innocent of his underlying offense, since the government
3 was permitted to introduce suppressed evidence based on the fact
4 that prior to trial the government filed a notice to enhance the
5 offense to 21 U.S.C. § 851. (See Opposition at 2-5).⁸

6
7 ⁸ With respect to Petitioner's alleged claims of actual
8 innocence, the Petition and/or Supplemental Brief contains inter
9 alia the following allegations: (1) "In the case at bar, an
10 intervening change in the law by the Supreme Court has rendered
11 [Petitioner's] sentence unconstitutional. See, Descamps v. United
12 States, 133 S.Ct. 2276, 2285, 186 L.Ed.2d 438 (2013). And most
13 recently, the Ninth Circuit, after applying Descamps, held that the
14 Minnesota statute under which [Petitioner] was convicted is not a
15 'drug trafficking offense.' See United States v. Gonzalez-Reyes,
16 535 Fed.Appx. 592 (9th Cir. 2013). Therefore, it logically
17 followed that it cannot be used as a predicate for a § 851
18 enhancement." (Petition at 3); (2) "Descamps thus requires the
19 courts to determine whether a state statute 'lists muliple,
20 alternative elements, and so effectively creates several different
21 crimes.'" [¶] The Ninth Circuit in a sound application of Descamps
22 recently held that Minnesota Statute § 152.02 subdivision 1(1) is
23 not a drug trafficking offense[] [b]ecause it 'sweep[s] more
24 broadly' than the Guideline definition of a 'drug trafficking
25 offense.' [¶] [¶] Therefore, in light of Descamps, supra,
26 and Gonzalez-Reyes, supra, [Petitioner] is actually innocent of the
27 penalty impose [sic] and ineligible to receive the § 851
28 enhancement in this case." (Petition at 7, citations omitted).; (3)
"Petitioner is actually innocent of underlying offense because
Descamps and Gonzales-Reyes, have determined that the state
predicate used to enhance Petitioner's sentence is not a drug
trafficking offense therefore it should have never been presented
at trial and the outcome of trial proceeding cannot be said to
reliable." (Petition at 8); (4) "Petitioner is entitled to habeas
relief where the new Supreme Court ruling in Descamps v. United
States, 133 S.Ct. 2276, combined with the evidence in the record[,]
necessarily dictate his innocence of the underlying offense in this
case." (Petition at 8); (5) "Had the jury not been exposed to the
evidence that was supposed to be suppressed in the first place and
should not have been presented, it is more likely than not that no
reasonable juror viewing the record as a whole would lack
reasonable doubt." (Petition at 9); (6) "At the time of
[Petitioner's] sentencing the District Court, in error, determined
(continued...)"

1 Petitioner's reliance on several cases -- Descamps v. United
2 States, Molina-Martinez v. United States, Peugh v. United States,
3 and United States v. Booker -- is unavailing. Those cases involved
4 claims of sentencing error, not claims of actual innocence. See
5 Descamps, 133 S.Ct. at 2293 ("[The district court] and the Ninth
6 Circuit erred in invoking the modified categorical approach to look
7 behind [defendant's] conviction in search of record evidence that
8 he actually committed the generic offense. The modified approach
9 does not authorize a sentencing court to substitute such a fact-
10 based inquiry for an elements-based one. A court may use the
11 modified approach only to determine which alternative element in a
12 divisible statute formed the basis of the defendant's
13 conviction."); Molina-Martinez, 136 S.Ct. at 1348 ("The decision
14 today simply states that courts reviewing sentencing errors cannot
15 apply a categorical rule requiring additional evidence in cases,
16 like this one, where the district court applied an incorrect range

17 ⁸(...continued)
18 that [Petitioner] was a category VI with fourteen criminal points.
19 There is nothing in the record to determine that the judge wouldn't
20 have given [Petitioner] a lesser sentence had it known he only had
21 ELEVEN criminal history points." (Supplemental Brief at 5-6).
22 (Supplemental Brief at 5-6); (7) "Under Molina-Martinez v. United
23 States[,] [Petitioner] now should be subjected to a plain error
24 standard for his Booker v. United States errors and not harmless
25 error." (Supplemental Brief at 7; see also Supplemental Brief at
26 9); (8) "In Peugh v. U.S. the Supreme Court held that a retroactive
27 increase in the guidelines violates ex pos [sic] facto."
28 (Supplemental Brief at 9).; (9) "[Petitioner] is entitled to a
sentence that does not exceed the sentence he would have received
pursuant to the guidelines base level, without the enhancements."
(Supplemental Brief at 10); and (10) "Under Molina-Martinez v.
United States[,], [Petitioner] is entitled to be remanded for
resentencing." (Supplemental Brief at 13).

1 but nevertheless sentenced the defendant within the correct range.
2 Rejection of that rule means only that a defendant can rely on the
3 application of an incorrect Guidelines range to show an effect on
4 his substantial rights."); Peugh, 133 S.Ct. at 2078, 2081, 2088
5 (holding that sentencing a defendant under more onerous Sentencing
6 Guidelines promulgated after the defendant's commission of the
7 offenses constitutes a violation of the Ex Post Facto Clause);
8 Booker, 543 U.S. at 226-43 (finding that the Federal Sentencing
9 Guidelines, which permitted the trial court to impose for a
10 defendant convicted of possessing at least 50 grams of cocaine a
11 longer sentence than the range authorized by the Guidelines [based
12 on the trial court's finding by a preponderance of evidence that
13 the defendant possessed an additional quantity of cocaine],
14 violated the defendant's Sixth Amendment right to a jury trial, as
15 construed by Blakely v. Washington, 542 U.S. 296, 303 (2004)).

16
17 Contrary to Petitioner's assertion, the claims alleged in the
18 Petition, including Petitioner's claim(s) of ineffective assistance
19 of trial counsel, are not claims of actual innocence. See Frank v.
20 Banks, 2011 WL 3477096, at *3-5 (C.D. Cal. July 15, 2011), adopted,
21 2011 WL 3476602 (C.D. Cal. Aug. 9, 2011) (agreeing that "every
22 circuit" to have addressed the issue "has concluded that the
23 savings clause embodied in § 2255(e) requires a claim of actual
24 innocence directed to the underlying conviction, not merely the
25 sentence"); Gamboa v. Norwood, 2009 WL 482304, *4 (C.D. Cal. Feb.
26 23, 2009) ("[A] *Booker* 'claim is not, by itself, a claim of actual
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innocence.'"; citation omitted); Saikaly v. Smith, 2006 WL 2827690,
*1 (E.D. Cal. Sept. 29, 2006) ("Petitioner claims constitutional
error in the calculation of his sentence. Sentencing error does
not constitute actual innocence").

In addition, Petitioner has not even purported to make a
showing of actual innocence, supported by new reliable evidence.
See Schlup v. Delo, 513 U.S. 298, 324 (1995) ("To be credible, [a
claim of actual innocence] requires petitioner to support his
allegations of constitutional error with new reliable evidence--
whether it be exculpatory scientific evidence, trustworthy
eyewitness accounts, or critical physical evidence--that was not
presented at trial.").

Because the savings clause requires Petitioner to satisfy both
his actual innocence and his lack of an "unobstructed procedural
shot" at presenting his claims, see Harrison, supra, Petitioner's
failure to allege actual innocence renders it unnecessary for the
Court to address whether Petitioner lacked an unobstructed
procedural shot to pursue the claims presented in his Petition.

Since Petitioner has failed to make a claim of actual
innocence, Petitioner can only raise his contentions in a motion
that is filed pursuant to 28 U.S.C. § 2255 and the only court with
jurisdiction over such a motion is the sentencing court which is
the United States District Court for the District of Minnesota.

1 A court lacking jurisdiction of a civil action may transfer
2 the action to a court in which the action could have been brought,
3 provided the transfer is "in the interest of justice." 28 U.S.C.
4 § 1631; see Cruz-Aguilera v. I.N.S., 245 F.3d 1070, 1074 (9th Cir.
5 2001). Here, the transfer of this action to the United States
6 District Court for the District of Minnesota would not be in the
7 interest of justice because it would be futile. First, a § 2255
8 motion likely would be barred by the one-year statute of
9 limitations. See 28 U.S.C. § 2255(f)(1). Second, the United
10 States District Court for the District of Minnesota would not be
11 able to entertain a "second or successive" § 2255 motion absent
12 authorization from the Eighth Circuit Court of Appeals. See 28
13 U.S.C. § 2255(h).

14
15 **IV. RECOMMENDATION**
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17 For the reasons discussed above, IT IS RECOMMENDED that the
18 district court issue an Order: (1) approving and accepting this
19 Report and Recommendation; (2) granting the Motion to Dismiss the
20 Petition; and (3) directing that Judgment be entered dismissing
21 this action without prejudice.

22
23 DATED: June 2, 2017
24

25 _____/s/
26 ALKA SAGAR
27 UNITED STATES MAGISTRATE JUDGE
28

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

PETER GEORGE NOE,	)	NO. CV 17-01574-AB (AS)
	)	
Petitioner,	)	
	)	ORDER ACCEPTING FINDINGS,
v.	)	
	)	CONCLUSIONS AND RECOMMENDATIONS OF
Warden, USP VICTORVILLE,	)	
	)	UNITED STATES MAGISTRATE JUDGE
Respondents.	)	
	)	
	)	

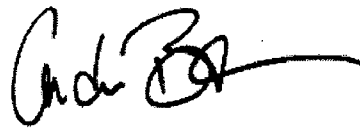
Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. After having made a *de novo* determination of the portions of the Report and Recommendation to which objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge in the Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition without prejudice.

1 IT IS FURTHER ORDERED that the Clerk serve copies of this Order,
2 the Magistrate Judge's Report and Recommendation and the Judgment herein
3 on counsel for Petitioner and counsel for Respondents.

4
5 LET JUDGMENT BE ENTERED ACCORDINGLY.

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7 DATED: September 11, 2017.

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ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT JUDGE
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