APPENDIX 1A:

"Order Denying Neal's Motion for Certificate of Appealability"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 31 2025

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

BYRON NEAL,

Petitioner - Appellant,

v.

WARDEN, FCI Terminal Island,

Respondent - Appellee.

No. 24-5317

D.C. No. 2:23-cv-02921-CAS-PVC
Central District of California,
Los Angeles

ORDER

Before: CLIFTON and VANDYKE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition 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); *Porter v. Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001) (order) (holding that a successive 28 U.S.C. § 2255 motion disguised as a 28 U.S.C. § 2241 petition requires a certificate of appealability).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BYRON NEAL,

Petitioner,

v.

J. ENGLMAN, Warden,[1]

Respondent.

Case No. CV 23-2921 CAS (PVC)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation (R&R) is submitted to the Honorable Christina A. Snyder, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

In April 2023, Byron Neal (Petitioner), a federal prisoner proceeding *pro se*, filed a habeas petition pursuant to 28 U.S.C. § 2241. ("Petition," Dkt. No. 1). Petitioner also

[1] J. Englman, Warden at FCI Terminal Island, where Petitioner is currently housed, is substituted for "Warden," the Respondent named in the Petition. Fed. R. Civ. P. 25(d).

filed a Memorandum of Law in support of his Petition. ("Mem.," Dkt. No. 2). On June 16, 2023, Petitioner filed a Motion to Dismiss the Petition. ("Motion," Dkt. No. 8). On August 29, 2023, Petitioner filed a response to the Motion. ("Resp.," Dkt. No. 12). For the reasons set forth below, it is recommended that the Petition be denied and that this action be DISMISSED WITHOUT PREJUDICE for lack of jurisdiction.

II.

PRIOR PROCEEDINGS

In December 2007, a federal grand jury in the Eastern District of Louisiana returned a three-count indictment charging Petitioner for violations of the Federal Controlled Substances Act. *See United States v. Neal*, No. CRIM.A. 07-425, 2015 WL 967552, at *1 (E.D. La. Mar. 4, 2015). In February 2009, a federal grand jury returned a superseding indictment, charging two additional counts for conspiring to murder and tampering with a witness or informant (Counts Four and Five). *See id.* In July 2011, Petitioner pleaded guilty to all charges contained in the superseding indictment. *See id.* at *2. The next day, Petitioner moved to withdraw his guilty pleas, which the court denied and sentenced him to 360 months in the Bureau of Prisons (BOP). *See id.* On appeal, the Fifth Circuit vacated Petitioner's convictions on Counts Four and Five and remanded for re-pleading with respect to those two counts. *See id.* On remand, the district court granted the Government's motion to dismiss those counts. *See id.* at *2 n.1.

In October 2014, Petitioner filed his original § 2255 motion in the Eastern District of Louisiana, which was denied with prejudice in March 2015. (Pet. at 4);[2] *see Neal*, 2015 WL 967552, at *7. In 2016, Petitioner filed a second § 2255 motion in the Eastern District of Louisiana, arguing that his career offender status was unconstitutional in light

[2] For ease of reference when citing to the parties' submissions, the Court cites to the CM/ECF-generated page numbers on the Court's docket.

of *Johnson v. United States*, 576 U.S. 592 (2015). (*See* Motion at 5). The district court denied the motion, noting that "Defendant was not sentenced pursuant to the Armed Career Criminal Act, let alone the residual clause of the former 18 U.S.C. § 924(d) at issue in *Johnson*. (*See id.*).

Petitioner, who is now being housed at FCI Terminal Island, in San Pedro, California, filed the instant Petition on April 17, 2023.

III.

PETITIONER'S CLAIMS

The Petition raises a single ground for federal habeas relief, arguing that he is actually innocent of the conspiracy or solicitation to murder offense, which the district court used to calculate his sentence guidelines range. (Pet. at 6).

IV.

DISCUSSION

A. The Petition Is a Disguised § 2255 Motion That May Be Brought Only in the Eastern District of Louisiana.

"[I]n order to determine whether jurisdiction is proper, a court must first determine whether a habeas petition is filed pursuant to § 2241 or § 2255 before proceeding to any other issue." *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000). If the Petition falls under § 2255, it must be brought in the jurisdiction of the sentencing court, which here is the United States District Court for the Eastern District of Louisiana. *See id.* ("§ 2255 motions must be heard in the sentencing court"). However, if the Petition falls under § 2241, it must be filed in the custodial jurisdiction, which is the Central District of

California. *See id.* ("a habeas petition filed pursuant to § 2241 must be heard in the custodial court").

"Section 2255 allows a federal prisoner claiming that his sentence was imposed 'in violation of the Constitution or laws of the United States' to 'move the court which imposed the sentence to vacate, set aside or correct the sentence.'" *Harrison v. Ollison*, 519 F.3d 952, 955 (9th Cir. 2008) (quoting 28 U.S.C. § 2255(a)). "The general rule is that a motion under 28 U.S.C. § 2255 is the exclusive means by which a federal prisoner may test the legality of his detention and that restrictions on the availability of a § 2255 motion cannot be avoided through a petition under 28 U.S.C. § 2241." *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006) (citations omitted); *see Lorentsen v. Hood*, 223 F.3d 950, 953 (9th Cir. 2000) ("In general, § 2255 provides the exclusive procedural mechanism by which a federal prisoner may test the legality of detention."); *see also Jones v. Hendrix*, 143 S. Ct. 1857, 1869 (2023) ("Section 2255 owes its existence to Congress' pragmatic judgment that the sentencing court, not the District Court for the district of confinement, is the best venue for a federal prisoner's collateral attack on his sentence."). On the other hand, a habeas corpus petition under § 2241 is the appropriate vehicle by which a federal prisoner challenges the manner, location, or conditions of the execution of his sentence. *Hernandez*, 204 F.3d at 864. Accordingly, "[a] federal prisoner authorized to seek relief under section 2255 may not petition for habeas corpus relief pursuant to section 2241 if it appears 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." *United States v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997).

Here, Petitioner is plainly challenging the legality of his sentence, as he contends that the sentencing court improperly used the conspiracy or solicitation to murder offense to calculate his sentence guidelines range. (Pet. at 6). Accordingly, § 2255 is the

appropriate vehicle for review, and Petitioner's attempt to use § 2241 is not appropriate. Nevertheless, Petitioner argues that because he is "actually innocent" of the conspiracy or solicitation to murder offense, the savings clause of § 2255 applies. (Mem. at 12–23; Resp. at 3).

"Under the savings clause of § 2255, … a federal prisoner may file a habeas corpus petition pursuant to § 2241 to contest the legality of a sentence where his remedy under § 2255 is inadequate or ineffective to test the legality of his detention." *Hernandez*, 204 F.3d at 864–65 (citation omitted); *see* 28 U.S.C. § 2255(e) (stating that an application for a writ of habeas corpus by a prisoner in federal custody must be presented to the sentencing court as a motion under § 2255 "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention"). The Ninth Circuit has explained that a remedy qualifies as inadequate or ineffective for purposes of § 2255 only when a petitioner "(1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." *Stephens*, 464 F.3d at 898 (citation omitted); *accord Allen v. Ives*, 950 F.3d 1184, 1188 (9th Cir. 2020). A petitioner "must satisfy both of those requirements" to get through § 2255's "escape hatch" and be allowed to file a § 2241 petition in the custodial court. *Muth v. Fondren*, 676 F.3d 815, 819 (9th Cir. 2012); *accord Marquez-Huazo v. Warden, FCI-Herlong*, No. 22-15787, 2023 WL 2203560, at *1 (9th Cir. Feb. 24, 2023).

Here, Petitioner does not explain what "unobstructed procedural shot" prevented him from making his actual innocence claim on either direct appeal or in his initial § 2255 motion. Furthermore, "§ 2255's remedy is not 'inadequate or ineffective' merely because § 2255's gatekeeping provisions prevent the petitioner from filing a second or successive petition." *Ivy v. Pontesso*, 328 F.3d 1057, 1059 (9th Cir. 2003), *abrogated on other grounds by Jones*, 143 S. Ct. at 1867–68. Nonetheless, Petitioner has not raised a viable actual innocence claim. While he argues that the sentencing court wrongly considered a

solicitation to commit murder charge in determining his sentence despite those charges being later dismissed (Pet. at 6), he provides no evidence that he was actually innocent of solicitation to commit murder.[3] "It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998); *accord Muth*, 6765 F.3d at 819; *see generally Gandarela v. Johnson*, 286 F.3d 1080, 1085 (9th Cir. 2002) (Petitioner must demonstrate that he "is innocent of the charge for which he is incarcerated, as opposed to legal innocence as a result of legal error.") (citation omitted). Accordingly, because Petitioner has had an unobstructed opportunity to present his actual innocence claim to the sentencing court and has failed to demonstrate *factual* innocence, the § 2255 escape hatch does not apply. For this reason, the Petition must be construed as a § 2255 motion, not a habeas petition under § 2241. Accordingly, it must be brought in the jurisdiction of the sentencing court, which is the Eastern District of Louisiana.

B. The Petition Is Successive.

"A petitioner is generally limited to one motion under § 2255[ ] and may not bring a 'second or successive motion' unless it meets the exacting standards of 28 U.S.C. § 2255(h)." *United States v. Washington*, 653 F.3d 1057, 1059 (9th Cir. 2011). "A prisoner may not bring a second or successive § 2255 motion in district court unless 'a panel of the appropriate court of appeals' certifies that the motion contains: '(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law,

[3] In his response, Petitioner argues that "his conspiracy to murder should be dismissed because the Court erred in charging with him an offense in which [he] is actually innocent." (Resp. at 3). But after the the Fifth Circuit vacated Petitioner's convictions on Counts Four and Five, the district court granted the Government's motion to dismiss those counts. *Neal*, 2015 WL 967552, at *2 & n.1.

made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" *Harrison*, 519 F.3d at 955 (quoting 28 U.S.C. § 2255(h)). Because Petitioner has already filed a § 2255 motion, *see supra* § II, the Petition, construed as a § 2255 motion, is successive. The record does not reflect that Petitioner sought or obtained permission from the Fifth Circuit to file this instant § 2255 motion. Accordingly, unless and until Petitioner obtains such authorization, no district court has jurisdiction to hear his claims.

C. The Petition Should Be Dismissed Rather Than Transferred Because It Is Time-Barred.

"When a second or successive ... § 2255 claim is filed in the district court without the required authorization from [the court of appeals], the district court may transfer the matter to [the court of appeals] if it determines it is in the interest of justice to do so under [28 U.S.C.] § 1631, or it may dismiss the motion or petition for lack of jurisdiction." *In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008); *see also Walters v. Ignacio*, 97 F. App'x 751, 752 (9th Cir. 2004) (rejecting claim that district court erred in dismissing successive petition rather than transferring it). Transfer of civil actions among federal courts to cure jurisdictional defects is appropriate if three conditions are satisfied: (1) the transferring court lacks jurisdiction; (2) the transferee court could have exercised jurisdiction at the time the action was filed; and (3) the transfer is in the interest of justice. 28 U.S.C. § 1631; *see Cruz-Aguilera v. INS*, 245 F.3d 1070, 1074 (9th Cir. 2001) (noting that § 1631, the federal transfer statute, "is applicable in habeas proceedings"). Here, transfer of the Petition to the Fifth Circuit is not in the interest of justice because Petitioner's claims appear to be time-barred and, thus, transfer of the Petition would be futile.[4] *See,*

[4] Petitioner was sentenced on October 27, 2011, and on January 28, 2013, the Fourth Circuit Court of Appeals affirmed the sentences imposed on Counts One through Three and vacated the convictions on Grounds Four and Five. *Neal*, 2015 WL 967552, at *2; *United States v. Neal*, 509 F. App'x 302, 313 (5th Cir. 2013). On October 7, 2013, the

e.g., Real v. California, 2018 WL 3219651, at *1 (C.D. Cal. June 28, 2018) (refusing to transfer untimely petition because it "would not be in the interest of justice). Accordingly, it is recommended that the Petition be dismissed for lack of jurisdiction.

D. The Dismissal Should Be Without Prejudice.

"A jurisdictional dismissal is not a judgment on the merits." *Wages v. I.R.S.*, 915 F.2d 1230, 1234 (9th Cir. 1990); *accord Hampton v. Pac. Inv. Mgmt. Co. LLC*, 869 F.3d 844, 846 (9th Cir. 2017); *see Manant v. United States*, 498 F. App'x 752 (9th Cir. 2012) ("Dismissal of the Manants' action without prejudice was proper because the district court lacked jurisdiction ...."). A court ordering a dismissal based upon lack of subject matter jurisdiction "retains no power to make judgments relating to the merits of the case," or even "to rule alternatively on the merits of a case." *Wages*, 915 F.2d at 1234 (citation omitted). Thus, "where a court lacks subject matter jurisdiction, it also lacks the power to dismiss with prejudice." *Hernandez v. Conriv Realty Associates*, 182 F.3d 121, 123 (2d Cir. 1999); *see Murray v. Conseco, Inc.*, 467 F.3d 602, 605 (7th Cir. 2006) ("A court that lacks subject matter jurisdiction cannot dismiss a case with prejudice."). Consequently, the Court must dismiss the Petition without prejudice.

Supreme Court denied certiorari. *Neal v. United States*, 571 U.S. 871 (2013). The conviction therefore became "final," and the one-year statute of limitations began to run. *See Clay v. United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). Accordingly, absent tolling, to which Petitioner has not shown an entitlement, the statute of limitations expired on October 7, 2014, over eight years before Petitioner filed this action.

V.

RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the District Court issue an Order: (1) accepting and adopting this Report and Recommendation and (2) directing that Judgment be entered dismissing this action without prejudice for lack of jurisdiction.

DATED: September 11, 2023

PEDRO V. CASTILLO
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BYRON NEAL,

Plaintiff,

v.

J. ENGLMAN, Warden,

Defendant.

Case No. 2:23-cv-02921-CAS (PVC)

ORDER APPROVING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

I. INTRODUCTION

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus (dkt. 1, the "Petition"), all of the records herein, the Report and Recommendation of United States Magistrate Judge (dkt. 14, the "Report"), and Petitioner's Response to the Magistrate Judge's Report and Recommendation (dkt. 17, the "Response"). Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a de novo review of those portions of the Report to which objections have been stated. Having completed its review, the Court accepts the findings and recommendations set forth in the Report.

II. BACKGROUND

In December 2007, a federal grand jury in the Eastern District of Louisiana returned a three-count indictment charging petitioner for violations of the Federal Controlled Substances Act. See United States v. Neal, No. CRIM.A. 07-425, 2015 WL 967552, at *1 (E.D. La. Mar. 4, 2015). In February 2009, a federal grand jury returned a superseding indictment, charging petitioner with two additional counts for conspiring to murder and tampering with a witness or informant (Counts Four and Five). See id. In July 2011, Petitioner pleaded guilty to all charges contained in the superseding indictment. See id. at *2. The next day, Petitioner moved to withdraw his guilty pleas, which the court denied. The Court sentenced petitioner to 360 months in the Bureau of Prisons (BOP). See id. On appeal, the Fifth Circuit vacated Petitioner's convictions on Counts Four and Five and remanded for re-pleading with respect to those two counts. See id. On remand, the district court granted the Government's motion to dismiss those counts. See id. at *2 n.1.

In October 2014, Petitioner filed his original § 2255 motion in the Eastern District of Louisiana, which was denied with prejudice in March 2015. Petition at 4; 2 see Neal, 2015 WL 967552, at *7. In 2016, Petitioner filed a second § 2255 motion in the Eastern District of Louisiana, arguing that his career offender status was unconstitutional in light of Johnson v. United States, 576 U.S. 592 (2015). See Motion at 5. The district court denied the motion, noting that "Defendant was not sentenced pursuant to the Armed Career Criminal Act, let alone the residual clause of the former 18 U.S.C. § 924(d) at issue in Johnson." See id.

Petitioner, now being housed at FCI Terminal Island in San Pedro, California, filed the instant Petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255 on April 17, 2023.

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III. LEGAL STANDARD

"[I]n order to determine whether jurisdiction is proper, a court must first determine whether a habeas petition is filed pursuant to § 2241 or § 2255 before proceeding to any other issue." Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir. 2000). If the Petition falls under § 2255, it must be brought in the jurisdiction of the sentencing court, which here is the United States District Court for the Eastern District of Louisiana. See id. ("§ 2255 motions must be heard in the sentencing court"). However, if the Petition falls under § 2241, it must be filed in the custodial jurisdiction, which is the Central District of California. See id. ("a habeas petition filed pursuant to § 2241 must be heard in the custodial court").

"Section 2255 allows a federal prisoner claiming that his sentence was imposed 'in violation of the Constitution or laws of the United States' to 'move the court which imposed the sentence to vacate, set aside or correct the sentence.'" Harrison v. Ollison, 519 F.3d 952, 955 (9th Cir. 2008) (quoting 28 U.S.C. § 2255(a)). "The general rule is that a motion under 28 U.S.C. § 2255 is the exclusive means by which a federal prisoner may test the legality of his detention and that restrictions on the availability of a § 2255 motion cannot be avoided through a petition under 28 U.S.C. § 2241." Stephens v. Herrera, 464 F.3d 895, 897 (9th Cir. 2006) (citations omitted); see Lorentsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000) ("In general, § 2255 provides the exclusive procedural mechanism by which a federal prisoner may test the legality of detention."); see also Jones v. Hendrix, 143 S. Ct. 1857, 1869 (2023) ("Section 2255 owes its existence to Congress' pragmatic judgment that the sentencing court, not the District Court for the district of confinement, is the best venue for a federal prisoner's collateral attack on his sentence.").

On the other hand, a habeas corpus petition under § 2241 is the appropriate vehicle by which a federal prisoner challenges the manner, location, or conditions

of the execution of his sentence. Hernandez, 204 F.3d at 864. Accordingly, "[a] federal prisoner authorized to seek relief under section 2255 may not petition for habeas corpus relief pursuant to section 2241 if it appears 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.*" United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997) (emphasis added).

As noted above, the savings clause of § 2255(e) provides that "a federal prisoner may file a habeas corpus petition pursuant to § 2241 to contest the legality of a sentence where his remedy under § 2255 is inadequate or ineffective to test the legality of his detention." Hernandez, 204 F.3d at 864–65 (citation omitted); see 28 U.S.C. § 2255(e) (stating that an application for a writ of habeas corpus by a prisoner in federal custody must be presented to the sentencing court as a motion under § 2255 "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention"). The Ninth Circuit has explained that a remedy qualifies as inadequate or ineffective for purposes of § 2255 only when a petitioner "(1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." Stephens, 464 F.3d at 898 (citation omitted); accord Allen v. Ives, 950 F.3d 1184, 1188 (9th Cir. 2020). A petitioner "must satisfy both of those requirements" to get through § 2255's "escape hatch" and be allowed to file a § 2241 petition in the custodial court. Muth v. Fondren, 676 F.3d 815, 819 (9th Cir. 2012); accord Marquez-Huazo v. Warden, FCI-Herlong, No. 22-15787, 2023 WL 2203560, at *1 (9th Cir. Feb. 24, 2023). In the context of a § 2255(e) claim, "'actual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998); accord Muth, 6765 F.3d at 819; see generally Gandarela v. Johnson, 286 F.3d 1080, 1085 (9th Cir. 2002) (Petitioner must demonstrate that he "is

innocent of the charge for which he is incarcerated, as opposed to legal innocence as a result of legal error.") (citation omitted).

IV. DISCUSSION

As previously discussed, in order for a custodial court to hear a § 2241 claim via § 2255(e)'s "escape hatch," the petitioner must show that (1) he has a claim of "actual innocence" as to the challenged conviction; and (2) he has not had an "unobstructed procedural shot at presenting that claim." Stephens, 464 F.3d at 898 (citation omitted).

Petitioner brings the instant § 2241 petition, arguing that his sentence is "unconstitutional because he is actually innocent of the conspiracy or solicitation to [commit] murder offense[s] [that] the court used to calculate his sentence guidelines range." Petition at 2. Specifically, he argues that the actual innocence prong is satisfied because Counts 4 and 5 of his superseding indictment were dismissed after his sentencing. Thus, he contends that these counts were improperly used to determine his sentence under the sentencing guidelines.

The magistrate judge found that "the Petition must be construed as a § 2255 motion, not as a habeas petition under § 2241," because "the § 2255 escape hatch does not apply." Report at 6. He specifically found that: (1) petitioner did not explain what "unobstructed procedural shot" prevented him from making his actual innocence claim on either direct appeal or in his initial § 2255 motion; and (2) petitioner has not raised a viable actual innocence claim. Id. The magistrate judge subsequently dismissed the Petition for lack of jurisdiction because petitioner had "already filed a [prior] § 2255 motion" and did not seek or obtain permission from to file the instant § 2255 motion. Id. at 6-7. He also declined to transfer the petition because petitioner's claims "appear to be time-barred and, thus, transfer . . . would be futile." Id. at 7.

Petitioner objects that: (1) the Petition falls under the savings clause of § 2255(e); (2) there is ambiguity as to where a § 2255 petition must be filed when a petitioner is no longer incarcerated in the district of conviction; (3) dismissal is unnecessarily punitive when transfer is available; and (4) denial of a petition "based on a technical jurisdictional issue [] contradict[s] the spirit of the statute." Response at 3-7.

The Court agrees with the magistrate judge's findings. As a threshold matter, it appears that the Petition does not fall within the § 2255 "escape hatch" and must therefore be construed as a § 2255 petition. The Ninth Circuit has held that, in order to satisfy the "unobstructed procedural shot" prong, the petitioner "must never have had the opportunity to raise [the claim] by motion." Ivy v. Pontesso, 328 F.3d 1057, 1060 (9th Cir. 2003). Here, petitioner has "not explain[ed] what 'unobstructed procedural shot' prevented him from making his actual innocence claim on either direct appeal or in his initial § 2255 motion" filed in the Eastern District of Louisiana in October 2014. Report at 5; see also Neal, 2015 WL 967552, at *7. By way of objection, petitioner argues that "[n]ew evidence or legal decisions *might* have emerged after the petitioner's initial § 2255 motion, which *could* justify revisiting the case." Response at 5 (emphasis added). However, petitioner has not cited any specific evidence or legal decisions to support his objection.[1]

Because the Petition is properly construed as a § 2255 petition, the magistrate judge correctly found that it must be denied as successive. "A petitioner is generally limited to one motion under § 2255[ ] and may not bring a

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[1] Because the Court finds that Petitioner has failed to meet the "unobstructed procedural shot" prong, it does not address whether Petitioner has met the "actual innocence" prong. Id.

'second or successive motion' unless it meets the exacting standards of 28 U.S.C. § 2255(h)." United States v. Washington, 653 F.3d 1057, 1059 (9th Cir. 2011). "A prisoner may not bring a second or successive § 2255 motion in district court unless 'a panel of the appropriate court of appeals' certifies that the motion contains: '(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" Harrison v. Ollison, 519 F.3d 952, 955 (9th Cir. 2008) (quoting 28 U.S.C. § 2255(h)). Here, petitioner "has already filed a § 2255 motion" and "[t]he record does not reflect that [p]etitioner sought or obtained permission from the Fifth Circuit to file this instant § 2255 motion." Report at 7.

As the magistrate judge observed, when a successive § 2255 claim is filed without the required authorization from the relevant court of appeals, the district court may either dismiss the petition or transfer the matter to the relevant court of appeals if the district court determines it is in the interest of justice to do so under 28 U.S.C. § 1631. Report at 7 (citing In re Cline, 531 F.3d 1249, 1252 (10th Cir. 2008)). The Court adopts the magistrate judge's finding that transfer would not be in the interest of justice because petitioner's claims appear to be time-barred. See id. It appears that Petitioner's conviction became final on October 7, 2013, and the relevant statute of limitations therefore expired on October 7, 2014. See id. at 7-8 n.4. Accordingly, the Petition must be dismissed.

V. CONCLUSION

Having completed its review, the Court accepts the findings and recommendations set forth in the Report. Accordingly, IT IS ORDERED that:

(1) the Petition is **DENIED**; and (2) Judgment shall be entered dismissing this action. The Court **DENIES** petitioner's request for a certificate of appealability.

Dated: August 9, 2024

Christina A. Snyder

CHRISTINA A. SNYDER
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BYRON NEAL,

Petitioner,

v.

J. ENGLMAN, Warden,[1]

Respondent.

Case No. CV 23-2921 CAS (PVC)

ORDER DENYING CERTIFICATE OF APPEALABILITY

By separate Order and Judgment filed concurrently herewith, the Court has determined that habeas relief should be denied and this action should be dismissed without prejudice. Under 28 U.S.C. § 2253(c)(1)(B), an appeal may not be taken from "the final order in a proceeding under section 2255" unless the appellant first obtains a certificate of appealability ("COA"). Pursuant to Rule 11 of the Rules Governing Section 2255 Cases, this Court must therefore "issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

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[1] J. Englman, Warden at FCI Terminal Island, where Petitioner is currently housed, is substituted for "Warden," the Respondent named in the Petition. Fed. R. Civ. P. 25(d).

Section 2253(c)(2) provides that "[a] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has made clear that § 2253(c)(2) does not bar appellate review when a district court's rejection of a habeas prisoner's petition rests on procedural grounds. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In such cases, a COA may issue when two showings are made:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition 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.

Id. Both showings, one directed at the underlying constitutional claims and the other directed at the district court's procedural holding, must be satisfied before the Court of Appeals "may entertain the appeal." *Id.* at 485.

In resolving the COA issue, "a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." *Id.* To that end, the law "allows and encourages the court to first resolve procedural issues" before addressing constitutional questions. *Id.* Accordingly, the Supreme Court instructs:

> Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

Id. at 484.

Here, the Petition was denied on procedural grounds, *i.e.*, lack of jurisdiction. Petitioner has not filed an application for a certificate of appealability. The Court has independently reviewed its decision and finds that reasonable jurists would not find

debatable the propriety of the Petition's dismissal. Accordingly, the Court declines to issue a COA.

IT IS SO ORDERED.

DATED: August 9, 2024

CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

Presented by:

PEDRO V. CASTILLO
UNITED STATES MAGISTRATE JUDGE