

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CHARLES IZAC,)	NO. CV 14-5487-PA(E)
)	
Petitioner,)	
)	
v.)	REPORT AND RECOMMENDATION OF
)	
WARDEN,)	UNITED STATES MAGISTRATE JUDGE
)	
Respondent.)	
_____)	

This Report and Recommendation is submitted to the Honorable Percy Anderson, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

BACKGROUND

On December 20, 2005, a jury in the United States District Court for the Northern District of West Virginia found Petitioner guilty of being a felon in possession of a firearm in violation of 18 U.S.C.

///

1 section 922(g)(1)¹ (Respondent's Ex. A, ECF Docket No. 14, Ex. A, p.
2 26).² On May 5, 2006, the United States District Court for the
3 Northern District of West Virginia sentenced Petitioner to a prison
4 term of 180 months to be followed by five years of supervised release
5 (id., p. 27; see "Judgment in a Criminal Case" filed May 5, 2006 in
6 United States v. Izac, No. 3:02cr58 (N.D.W.Va.)). The court imposed
7 the sentence pursuant to the Armed Career Criminal Act, 18 U.S.C.
8 section 924(e) ("ACCA"), based on Petitioner's prior convictions for
9 an "assault"³ and three burglaries (Petition, p. 10).⁴ The 180 month
10 prison sentence was the statutory mandatory minimum for a defendant
11 with three qualifying ACCA predicate offenses. See 18 U.S.C. §
12 924(e)(1). The United States Court of Appeals for the Fourth Circuit
13 affirmed the judgment on July 11, 2007. See People v. Izac, 239 Fed.
14 App'x 1 (4th Cir. 2007).

16
17 ¹ The Court takes judicial notice of the docket and
18 documents filed in United States v. Izac, No. 3:02cr58
19 (N.D.W.Va.). See Mir v. Little Company of Mary Hosp., 844 F.2d
646, 649 (9th Cir. 1988) (court may take judicial notice of court
records).

20 ² Respondents' Exhibits do not bear consecutive pages
21 numbers. The Court uses the ECF pagination.

22 ³ Although Petitioner references an "assault" conviction,
23 it appears that Petitioner had been found guilty of two counts of
attempting to injure an officer. See United States v. Izac, 2012
WL 8466142, at *2 (N.D.W.Va. Sept. 5, 2012).

24 ⁴ ACCA increases the sentences of certain federal
25 defendants who have three prior convictions "for a violent
26 felony," including "burglary, arson, or extortion." 18 U.S.C. §
27 924(e). Under the "categorical approach" endorsed by the United
28 States Supreme Court, a prior conviction qualifies as an ACCA
predicate offense only if the statutory elements of the offense
are the same as, or narrower than, those of the "generic" crime.
See Descamps v. United States, 133 S. Ct. 2276, 2281 (2013).

1 On July 15, 2014, Petitioner filed in this Court an uncaptioned
2 document titled "motion seeking relief from a federal judgment,"
3 purportedly seeking relief pursuant to 28 U.S.C. section 2241 ("the
4 Petition"). Petitioner seeks to challenge his Northern District of
5 West Virginia conviction and sentence for being a felon in possession
6 of a firearm. On October 6, 2014, Respondent filed "Government's
7 Opposition to Petition for Writ of Habeas Corpus, etc.," contending
8 that the Petition constitutes a second or successive motion to vacate
9 under 28 U.S.C. section 2255. Petitioner filed a "Response to
10 Government's Opposition" on October 20, 2014.

11
12 **PETITIONER'S CONTENTIONS**

13
14 Petitioner contends:

15
16 1. Petitioner is "actually innocent" of his ACCA sentence
17 because his prior convictions assertedly did not qualify as ACCA
18 predicate offenses; the burglaries allegedly were non-violent
19 residential burglaries and the burglaries and the "assault" allegedly
20 did not qualify as "crimes of violence" under Sentencing Guidelines;

21
22 2. Petitioner's sentence allegedly violated Alleyne v. United
23 States, 133 S. Ct. 2151 (2013) ("Alleyne"), because the court imposed
24 sentence based on factual findings assertedly made by the judge, not

25 ///

26 ///

27 ///

28 ///

1 the jury;⁵ and
2

3 3. Petitioner's trial counsel allegedly rendered ineffective
4 assistance in various ways, including assertedly: (1) failing to
5 represent Petitioner adequately in pretrial proceedings; (2) failing
6 to make a motion to suppress evidence allegedly obtained by means of
7 an unlawful search; (3) failing to object to a "tainted juror";
8 (4) failing to object to the court's refusal to allow Petitioner to
9 present three witnesses; (5) making outbursts in front of the jury;
10 (6) failing to challenge the use of Petitioner's prior convictions to
11 impose an ACCA sentence; and (7) generally disregarding Petitioner's
12 case due to an asserted bipolar disorder.
13

14 **PETITIONER'S PRIOR ACTIONS**
15

16 In the years following the 2006 imposition of his sentence,
17 Petitioner has filed numerous post-conviction challenges to his
18

19 ///

20 ///

21 ///

22 ⁵ In Alleyne, the Supreme Court overruled its previous
23 decision in Harris v. United States, 536 U.S. 545 (2002), and
24 held that, under the Sixth Amendment, any fact that increases the
25 mandatory minimum sentence for a crime is an element of the
26 criminal offense that must be submitted to the jury and proven
27 beyond a reasonable doubt. Alleyne, 133 S.Ct. at 2155
28 (concluding that Harris v. United States was inconsistent with
Apprendi v. New Jersey, 530 U.S. 466 (2000) ("Apprendi").
However, the Alleyne Court indicated that it was not disturbing
the exception to Apprendi for the fact of a prior conviction.
Alleyne, 133 S. Ct. at 2060 n.1.

1 conviction and/or sentence:⁶

2
3 On May 21, 2008, Petitioner filed in the sentencing court a
4 "Motion Under 28 USC § 2255 to Vacate, etc." (Respondent's Ex. B).
5 Therein, Petitioner asserted numerous claims, including a claim that
6 the presentence investigation report erroneously stated that
7 Petitioner had qualifying ACCA predicate convictions and a claim that
8 Petitioner's counsel allegedly rendered ineffective assistance.

9
10 On June 2, 2008, Petitioner filed in the United States Court of
11 Appeals for the Fourth Circuit an "Application for Leave to File a
12 Second or Successive Motion to Vacate, Set Aside or Correct Sentence
13 28 U.S.C. § 2255, etc." See In re Izac, No. 08-185 (4th Cir.). On
14 June 9, 2008, while this Application was still pending in the Fourth
15 Circuit, Petitioner filed in the sentencing court a second "Motion
16 Under 28 USC § 2255 to Vacate, etc.," alleging the same grounds for
17 relief as Petitioner's first section 2255 motion (Respondent's Ex. C).
18 On June 13, 2008, the Fourth Circuit denied Petitioner's June 2, 2008
19 Application on the ground that Petitioner's first section 2255 Motion
20 was still pending in the District Court and the second section 2255
21 Motion was premature (see "Order" filed June 13, 2008 in In re Izac,
22 No. 08-185 (4th Cir.)).

23
24 On August 7, 2008, the Magistrate Judge in the Northern District
25 of West Virginia issued a Report and Recommendation recommending

26
27 ⁶ The Court takes judicial notice of the dockets and
28 See Mir v. Little Company of Mary Hosp., 844 F.2d at 649.

1 denial of Petitioner's May 21, 2008 section 2255 Motion on the merits.
2 See Izac v. United States, 2008 WL 4238946 (N.D.W.Va. Aug 7, 2008).
3 On September 11, 2008, the District Judge issued an order adopting the
4 Report and Recommendation. See Izac v. United States, 2008 WL 4238949
5 (N.D.W.Va. Sept. 11, 2008). The Fourth Circuit denied a certificate
6 of appealability on March 23, 2009. See United States v. Izac, 319
7 Fed. App'x 210 (4th Cir. 2009).

8
9 On September 15, 2010, Petitioner sought to challenge his West
10 Virginia sentence by filing a habeas corpus petition in the United
11 States District Court for the District of New Jersey (see "Petition,
12 etc." filed September 15, 2010, in Izac v. Zickefoose, No. 1:10-cv-
13 4744-RMB (D.N.J.)). Petitioner again alleged that the presentence
14 report contained inaccurate information concerning Petitioner's prior
15 convictions used to enhance his ACCA sentence. On September 23, 2010,
16 the New Jersey District Court issued an order ruling on four of
17 Petitioner's actions then pending in that court, including
18 Petitioner's habeas petition in Izac v. Zickefoose. The New Jersey
19 District Court denied the petition on the ground that the petition was
20 actually a second or successive section 2255 motion. See Isac v.
21 Norwood, 2010 WL 3810216 (D.N.J. Sept. 23, 2010).

22
23 On June 27, 2011, Petitioner filed another section 2255 motion in
24 the sentencing court (Respondent's Lodgment D). Petitioner asserted,
25 among other things, that he was "actually innocent" of his ACCA
26 sentence because the sentence allegedly was based on prior convictions
27 that did not qualify as ACCA predicate offenses. Petitioner also
28 alleged a claim of ineffective assistance of counsel for assertedly

1 failing to file a motion to suppress assertedly illegally obtained
2 evidence and failing to challenge Petitioner's sentence on the ground
3 that Petitioner's prior convictions allegedly did not qualify as ACCA
4 predicate offenses. A Magistrate Judge in the sentencing court issued
5 a Report and Recommendation on July 19, 2011, recommending denial of
6 the motion as second or successive. See Izac v. United States, 2011
7 WL 5510732 (N.D.W.Va. July 19, 2011). The District Court issued an
8 order adopting the Report and Recommendation on November 10, 2011.
9 See Izac v. United States, 2011 WL 5510729 (N.D.W.Va. Nov. 10, 2011).

10
11 On January 12, 2012, Petitioner filed in the sentencing court a
12 "Motion for Review of Sentence Under 18 U.S.C. § 3741[A]," again
13 asserting his claims of unlawful search, ineffective assistance of
14 counsel and unlawful sentence due to the alleged absence of qualifying
15 ACCA predicate offenses (Respondent's Lodgment E). On September 5,
16 2012, the court denied the motion on procedural grounds and also
17 rejected on the merits Petitioner's claim that his prior burglary
18 convictions did not constitute qualifying ACCA predicate offenses.
19 See United States v. Izac, 2012 WL 8466142, at *2 (N.D.W.Va. Sept. 5,
20 2012).

21
22 On March 1, 2012, Petitioner filed a habeas corpus petition in
23 the United States District Court for the Southern District of West
24 Virginia (see "Motion Under 28 U.S.C. §2241," filed March 1, 2012, in
25 Izac v. United States, No. CV 5:12-613 (S.D.W.Va.)). Petitioner again
26 challenged the lawfulness of his ACCA sentence, contending he was
27 "actually innocent" of the sentence because his prior burglaries
28 assertedly were not violent. On May 21, 2012, the Magistrate Judge in

1 the Southern District of West Virginia issued "Proposed Findings and
2 Recommendation," recommending dismissal of the petition without
3 prejudice. See Izac v. United States, 2012 WL 2193198 (S.D.W.Va.
4 May 21, 2012). The District Court adopted the "Proposed Findings and
5 Recommendation" on June 14, 2012. See Izac v. United States, 2012 WL
6 2192290 (S.D.W.Va. June 14, 2012).

7
8 In the meantime, on May 8, 2012, Petitioner filed in the Fourth
9 Circuit a "Motion Under 28 U.S.C. § 2244 For Order Authorizing
10 District Court to Consider Second or Successive Application for Relief
11 Under 28 U.S.C. §§ 2254 or 2255" (see Izac v. United States, No. 12-
12 195 (4th Cir.)). Petitioner thereby sought leave to file another
13 section 2255 petition asserting claims of unlawful search, unlawful
14 sentence due to alleged absence of qualifying ACCA predicate offenses
15 (assertedly non-violent and non-residential burglaries), and
16 ineffective assistance of counsel in failing to file a motion to
17 suppress and failing to challenge Petitioner's sentence. The Fourth
18 Circuit denied the motion on May 31, 2012 (see "Order" filed May 31,
19 2012 in In re Izac, No. 12-195 (4th Cir.)).

20
21 On August 16, 2012, Petitioner filed another section 2255 motion
22 in the sentencing court (see Respondent's Lodgment F). Petitioner
23 alleged claims of unlawful search, ineffective assistance of counsel
24 in failing to file a motion to suppress and purported "actual
25 innocence" of his ACCA sentence because the sentence assertedly was
26 unsupported by qualifying ACCA predicate offenses. On December 18,
27 2012, the sentencing court denied the motion as untimely and
28 successive (see Respondent's Lodgment G). The Fourth Circuit denied a

1 certificate of appealability on October 25, 2013. See United States
2 v. Izac, 544 Fed. App'x 239 (4th Cir. 2013).

3
4 On September 27, 2012, Petitioner filed in the sentencing court
5 another "Motion for Review of Sentence Under 18 U.S.C. § 3742[A]" (see
6 United States v. Izac, No. 3:02cr58 (N.D.W.Va.)). The court construed
7 the motion as an appeal and directed the clerk to transmit the motion
8 to the Court of Appeals (see Respondent's Lodgment A, ECF Docket No.
9 14, Ex. A, p. 32, "Paperless Order" filed October 4, 2012, in United
10 States v. Izac, No. 3:02cr58 (N.D.W.Va.)). The Fourth Circuit
11 affirmed on February 25, 2013. See United States v. Izac, 511 Fed.
12 App'x 238 (4th Cir. 2013).

13
14 On March 1, 2013, Petitioner filed in the Fourth Circuit another
15 "Motion Under 28 U.S.C. § 2244 For Order Authorizing District Court to
16 Consider Second or Successive Application for Relief Under 28 U.S.C.
17 §§ 2254 or 2255" (see In re Charles Izac, No. 13-147 (4th Cir.)).
18 Petitioner therein asserted claims of alleged unlawful search, alleged
19 ineffective assistance of counsel in failing to file a motion to
20 suppress, and alleged "actual innocence" of Petitioner's sentence
21 because Petitioner's prior convictions supposedly did not qualify as
22 ACCA predicate offenses. On March 13, 2013, the Fourth Circuit denied
23 the motion (see "Order" filed March 13, 2013, in In re Charles Izac,
24 No. 13-147 (4th Cir.)).

25
26 On April 24, 2014, Petitioner filed a "Motion" in the sentencing
27 court, seeking deletion of criminal history points on the ground that
28 Petitioner's prior offenses supposedly did not qualify as ACCA

1 predicate offenses (see Respondent's Lodgment H). On April 29, 2014,
2 the sentencing court issued an order dismissing the motion as a second
3 or successive section 2255 motion. See Izac v. United States, 2014 WL
4 1689732 (N.D.W.Va. Apr. 29, 2014).

5
6 In the meantime, on April 23, 2014, Petitioner filed a petition
7 for an extraordinary writ in the Fourth Circuit (Respondent's Ex. I).⁷
8 Petitioner again asserted claims of actual innocence of the ACCA
9 sentence based on allegedly nonqualifying prior convictions and
10 ineffective assistance of counsel in failing to make a motion to
11 suppress and in failing to challenge Petitioner's sentence.
12 Petitioner also asserted that his sentence violated Alleyne. On
13 August 26, 2014, the Fourth Circuit construed the petition as a
14 section 2241 habeas corpus petition and denied the petition, stating
15 that the court saw no reason to depart from the general rule that the
16 court does not entertain original habeas petitions and also stating
17 that the interests of justice would not be served by a transfer of the
18 petition to the district court. See In re Izac, 2014 WL 4198353 (4th
19 Cir. Aug. 14, 2014).

20
21 **DISCUSSION**

22
23 A federal prisoner who contends that his or her conviction or
24 sentence is subject to collateral attack "may move the court which
25

26
27 ⁷ This petition did not bear a caption or title (see
28 "Petition for Extraordinary Writ, etc.," filed April 23, 2014, in
Izac v. United States, No. 14-6640 (4th Cir.)). The second page
of the document bore the heading "Motion Under 28 U.S.C. §2241."

1 imposed the sentence to vacate, set aside or correct the sentence."
2 28 U.S.C. § 2255. "Generally, motions to contest the legality of a
3 sentence must be filed under § 2255, while petitions that challenge
4 the manner, location, or conditions of a sentence's execution must be
5 brought pursuant to § 2241 in the custodial court." Hernandez v.
6 Campbell, 204 F.3d 861, 864 (9th Cir. 2000) (citations and footnote
7 omitted). A prisoner generally may not substitute a habeas petition
8 under 28 U.S.C. section 2241 for a section 2255 motion.

9
10 An application for a writ of habeas corpus in behalf of a
11 prisoner who is authorized to apply for relief by motion
12 pursuant to this section, shall not be entertained if it
13 appears that the applicant has failed to apply for relief,
14 by motion, to the court which sentenced him, or that such
15 court has denied him relief, unless it also appears that the
16 remedy by motion is inadequate or ineffective to test the
17 legality of his detention.

18
19 28 U.S.C. § 2255(e); see Stephens v. Herrera, 464 F.3d 895, 897-99
20 (9th Cir. 2006), cert. denied, 549 U.S. 1313 (2007); Hernandez v.
21 Campbell, 204 F.3d at 864.

22
23 Here, Petitioner repeatedly and unsuccessfully has applied for
24 relief under section 2255 in the sentencing court as well as in other
25 district courts. Petitioner's first such motion was denied on the
26 merits by the sentencing court. The Fourth Circuit subsequently has
27 rejected Petitioner's applications for leave to file a second or
28 successive section 2255 motion.

1 "Under the savings clause of § 2255, however, a federal prisoner
2 may file a habeas corpus petition pursuant to § 2241 to contest the
3 legality of a sentence where his remedy under section 2255 is
4 'inadequate or ineffective to test the legality of his detention.'" Hernandez v. Campbell, 204 F.3d at 864-65; see also Stephens v.
5 Herrera, 464 F.3d at 897. This "savings clause" exception to section
6 2255 exclusivity is a "narrow" exception. Ivy v. Pontesso, 328 F.3d
7 1057, 1059-60 (9th Cir.), cert. denied, 540 U.S. 1051 (2003); United
8 States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997).

10
11 Mere lack of success in the sentencing court does not make the
12 section 2255 remedy "inadequate or ineffective." Boyden v. United
13 States, 463 F.2d 229, 230 (9th Cir. 1972), cert. denied, 410 U.S. 912
14 (1973); see Tripati v. Henman, 843 F.2d 1160, 1162-63 (9th Cir.),
15 cert. denied, 488 U.S. 982 (1988). If the rule were otherwise, every
16 disappointed prisoner/movant incarcerated in a district different from
17 the sentencing district could pursue a repetitive section 2241
18 petition in the district of incarceration.

19
20 Similarly, neither the enforcement of the statute of limitations
21 nor the enforcement of restrictions on successive section 2255 motions
22 renders the section 2255 remedy "inadequate or ineffective" within the
23 meaning of the statute. See Moore v. Reno, 185 F.3d 1054, 1055 (9th
24 Cir. 1999), cert. denied, 528 U.S. 1178 (2000) (dismissal of a prior
25 section 2255 motion as successive does not render the section 2255
26 remedy "inadequate or ineffective"); Gilbert v. United States, 640
27 F.3d 1293, 1308 (11th Cir. 2011) (en banc), cert. denied, 132 S. Ct.
28 1001 (2012) (dismissal of earlier section 2255 motion as successive

1 does not render the section 2255 remedy "inadequate or ineffective");
2 Hill v. Morrison, 349 F.3d 1089, 1092 (8th Cir. 2003) ("a § 2255
3 motion is not 'inadequate or ineffective' merely because: (1) § 2255
4 relief has already been denied, (2) the petitioner has been denied
5 permission to file a second or successive § 2255 motion, (3) a second
6 or successive § 2255 motion has been dismissed, or (4) the petitioner
7 has allowed the one year statute of limitations and/or grace period to
8 expire.") (citations, internal brackets and quotations omitted);
9 Cradle v. U.S. ex rel. Miner, 290 F.3d 536, 539 (3d Cir. 2002)
10 ("Section 2255 is not inadequate or ineffective merely because the
11 sentencing court does not grant relief, the one-year statute of
12 limitations has expired, or the petitioner is unable to meet the
13 stringent gatekeeping requirements of the amended § 2255") (citations
14 omitted); Robinson v. United States, 2011 WL 4852499, at *2 (C.D. Cal.
15 Oct. 12, 2011) (savings clause does not apply merely because the
16 statute of limitations "now prevents the courts from considering a
17 section 2255 motion"); cf. Ivy v. Pontesso, 328 F.3d at 1060 ("[I]t is
18 not enough that the petitioner is presently barred from raising his
19 claim . . . by motion under § 2255. He must never have had the
20 opportunity to raise it by motion.").

21
22 Petitioner contends that the savings clause applies because
23 Petitioner purportedly is "actually innocent" of his ACCA sentence
24 (Petition, pp. 1-2).⁸ Petitioner contends his sentence was a "legal
25 nullity" because his prior convictions allegedly did not qualify as

26
27 ⁸ Petitioner does not contend he is "actually innocent"
28 of the underlying crime of possession of a firearm by an ex-
felon.

1 ACCA predicate offenses and because the court allegedly imposed
2 sentence based on facts assertedly found by the judge rather than by
3 the jury (Petition, pp. 2-4).
4

5 A federal prisoner may file a section 2241 petition under the
6 savings clause if the prisoner "(1) makes a claim of actual innocence,
7 and (2) has not had an unobstructed procedural shot at presenting that
8 claim." Marrero v. Ives, 682 F.3d 1190, 1192 (9th Cir. 2012), cert.
9 denied, 133 S. Ct. 1264 (2013) (citation and internal quotations
10 omitted). "[T]o establish actual innocence, petitioner must
11 demonstrate that, in light of all the evidence, it is more likely than
12 not that no reasonable juror would have convicted him." Bousley v.
13 United States, 523 U.S. 614, 623 (1998) (citation and quotations
14 omitted). "'Actual innocence means factual innocence, not mere legal
15 insufficiency.'" Marrero v. Ives, 682 F.3d at 1193 (quoting Bousley
16 v. United States, 523 U.S. at 623) (internal brackets omitted).
17

18 Petitioner's arguments that Petitioner's prior convictions
19 assertedly did not qualify as ACCA predicate offenses and that his
20 sentence allegedly violated Alleyne present "purely legal arguments"
21 that do not suffice to show Petitioner's actual innocence. See
22 Marrero v. Ives, 682 F.3d at 1193-95 ("purely legal" claim that
23 petitioner was wrongly classified as a career offender did not entail
24 a claim of actual innocence; noting cases in other circuits holding
25 that a petitioner generally cannot assert a cognizable claim of actual
26 innocence of a noncapital sentencing enhancement). Furthermore,
27 Alleyne does not apply retroactively on collateral review. See Hughes
28 v. United States, ___ F.3d ___, 2014 WL 5368857 (9th Cir. Oct. 23,

1 2014); accord In re Mazzio, 756 F.3d 487, 489-90 (6th Cir. 2014);
2 United States v. Reyes, 755 F.3d 210, 212 (3d Cir. 2014), pet. for
3 cert. filed (Oct. 16, 2014) (No. 14-6816, 14A272); In re Kemper, 735
4 F.3d 211, 212 (5th Cir. 2013); In re Payne, 733 F.3d 1027, 1029-30
5 (10th Cir. 2013). Petitioner's other claims, which concern alleged
6 ineffective assistance of counsel, similarly fail to show "actual
7 innocence." See, e.g., Cantillanos-Medina v. United States, 2013 WL
8 2355508, at *2 (E.D. Cal. May 29, 2013) (claims of ineffective
9 assistance of counsel do not show actual innocence for purposes of the
10 savings clause); Vasquez v. Norwood, 2009 WL 1704996, at *2 (C.D. Cal.
11 June 15, 2009) (same).

12
13 Accordingly, the savings clause does not apply in the present
14 case.⁹ Therefore, the Petition is a section 2255 motion over which
15 this Court lacks jurisdiction.

16
17 A court lacking jurisdiction of a civil action may transfer the
18 action to a court in which the action could have been brought,
19 provided the transfer is "in the interest of justice." 28 U.S.C. §
20 1631; see Cruz-Aguilera v. I.N.S., 245 F.3d 1070, 1074 (9th Cir.
21 2001). "Normally transfer will be in the interest of justice because
22 normally dismissal of an action that could be brought elsewhere is

23
24 ⁹ In light of the Court's conclusion that Petitioner has
25 failed to show "actual innocence" within the meaning of the
26 savings clause, the Court need not, and does not, determine
27 whether Petitioner has had or still has an "unobstructed
28 procedural shot" at presenting his claim based on Alleyne. The
Court does not intend its ruling here to preclude Petitioner from
seeking relief on this claim through a section 2255 motion filed
in the sentencing court following authorization by the Fourth
Circuit.

1 time consuming and justice-defeating." Id. at 1074 (citations and
2 quotations omitted).

3
4 In determining whether to transfer an action, the Court must
5 consider whether the action would have been timely had the action been
6 filed in the proper forum. See Taylor v. Soc. Sec. Admin., 842 F.2d
7 232, 233 (9th Cir. 1988). It may well be that the applicable one-year
8 statute of limitations bars the present action, given the fact that
9 Petitioner's direct appeal concluded in 2007. See 28 U.S.C. §
10 2255(f). In any event, the Court should not transfer this action
11 because, for a separate reason, a transfer would be an idle act. As
12 in Crosby v. United States, 2011 WL 6986789 (C.D. Cal. Dec. 15, 2011),
13 adopted, 2012 WL 84768 (C.D. Cal. Jan. 11, 2012), and Scott v. Ives,
14 2010 WL 295786 (E.D. Cal. Jan. 13, 2010), a transfer to the district
15 of conviction would not benefit Petitioner because the district of
16 conviction would be unable to entertain the matter. The United States
17 District Court for the Northern District of West Virginia could not
18 entertain this "second or successive" section 2255 motion absent
19 Fourth Circuit authorization. See 28 U.S.C. § 2244, 2255(h).

20
21 In his Response, Petitioner states that if his claim of actual
22 innocence does not succeed, Petitioner wishes to invoke the All Writs
23 Act, 28 U.S.C. section 1651(a) (Response, p. 2). However, a motion
24 for issuance of a writ pursuant to the All Writs Act must be brought
25 in the sentencing court, here the United States District Court for the
26 Northern District of West Virginia. See United States v. Monreal, 301
27 F.3d 1127, 1131 (9th Cir. 2002), cert. denied, 537 U.S. 1178 (2003)
28 (writ of error corum nobis may only be brought in the sentencing

1 court); Madigan v. Wells, 224 F.2d 577, 578 n.2 (9th Cir. 1955), cert.
2 denied, 351 U.S. 911 (1956) (same); Valencia-Mazariegos v. United
3 States, 2014 WL 1767706, at *2 (W.D. Tex. May 1, 2014) (petition for
4 writ of corum nobis or audita querela must be brought in sentencing
5 court); Harris v. United States, 2009 WL 2957811, at *1 (W.D. Wash.
6 Sept. 14, 2009) (writ of error audita querela challenging federal
7 conviction must be filed in sentencing court). Like a transfer of
8 Petitioner's de facto section 2255 motion, a transfer of Petitioner's
9 putative All Writs Act motion to the Northern District of West
10 Virginia would be an idle act. A prisoner may not avoid the statutory
11 limitations on second or successive section 2255 motions by seeking
12 relief under the All Writs Act. See, e.g., Matus-Leyva v. United
13 States, 287 F.3d 758, 761 (9th Cir.), cert. denied, 537 U.S. 1022
14 (2002); United States v. Valdez-Pacheco, 237 F.3d 1077, 1079-80 (9th
15 Cir. 2001); see also In re Davenport, 147 F.3d 605, 608 (7th Cir.
16 1998) ("if Congress has forbidden federal prisoners to proceed under
17 2241 even when 2255 is closed to them - then it would be senseless to
18 suppose that Congress permitted them to pass through the closed door
19 simply by changing the number 2241 to 1651 on their motions").

20
21 **RECOMMENDATION**

22
23 For all of the foregoing reasons, IT IS RECOMMENDED that the
24 Court issue an Order: (1) accepting and adopting this Report and

25 ///

26 ///

27 ///

28 ///

1 Recommendation; and (2) directing that Judgment be entered denying and
2 dismissing the Petition without prejudice.

3
4 DATED: October 29, 2014.

5
6 _____/s/_____
7 CHARLES F. EICK
8 UNITED STATES MAGISTRATE JUDGE
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **NOTICE**

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

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28