



1 on the ground that he is factually innocent of the charges. (Petition ¶ 9(a).) For the reasons set forth  
2 below, the Court will re-characterize the putative section 2241 / 2243 petition as a motion pursuant to  
3 28 U.S.C. § 2255 and dismiss the action for lack of subject-matter jurisdiction.

## 4 5 **II. PROCEDURAL HISTORY<sup>2</sup>**

6 On July 26, 1996, a jury convicted petitioner of two counts of solicitation to murder a federal  
7 probation officer in violation of 18 U.S.C. §§ 373 and 1114. Petitioner was sentenced to a term of 365  
8 months (thirty years and five months) in federal prison.

9 Petitioner filed a direct appeal to the U.S. Court of Appeals for the Fourth Circuit and raised the  
10 following issues: (1) the trial court erred in denying his pre-trial and pre-sentencing motions for a  
11 psychiatric examination and that the court enhancement of his criminal history category was  
12 inappropriate; (2) the wiretaps used against him were illegally obtained; (3) the wiretap tapes were  
13 unintelligible, prejudicial, confusing, misleading, and not protected against tampering; (4) the district  
14 court erred in denying his motion for acquittal on the ground of insufficiency of evidence to support the  
15 solicitation charge; (5) the district court erred in denying his motion to suppress certain statements which  
16 petitioner made on the wiretap tapes; (6) violation of the Double Jeopardy clause; (7) prosecutorial  
17 misconduct; and (8) ineffective assistance of counsel. The Fourth Circuit affirmed the conviction on  
18 April 2, 1998. The United States Supreme Court denied certiorari. *Crosby v. United States*, 525 U.S.  
19 987, 119 S. Ct. 456, 142 L. Ed. 2d 409 (1998).

20 On June 9, 1999, petitioner filed a 28 U.S.C. § 2255 habeas corpus motion. That motion raised  
21 a plethora of claims, including claims corresponding to those raised herein.

22  
23 <sup>1</sup>(...continued)

24 Petition does not contain a proof of service, petitioner dated his signature as October 28, 2014. (Petition  
25 at 5.) Thus, the petition was filed no earlier than October 28, 2014. The Court will assume, without  
deciding, that petitioner provided a copy of the petition to prison officials for filing on the date he signed  
it.

26 <sup>2</sup>

27 The following factual recitation is based on the exhibits which the respondent government filed  
28 in support of its motion to dismiss in *Crosby v. United States of America*, Case No. LA CV 11-08425-  
VBF-FFM (the “11-8425 Action”), Document Nos. 5-1 through 5-6 filed November 1, 2011.



1 28 U.S.C. § 2244(b), a petitioner may not file a second or successive § 2255 motion without first  
2 obtaining authorization from the appropriate court of appeals. *See* 28 U.S.C. § 2244(b)(3)(A); *Moore*  
3 *v. Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999). The circuit court will not authorize a second or successive  
4 section 2255 motion unless:

- 5
- 6 (A) the applicant shows that the claim relies on a new rule of constitutional law, made  
7 retroactive to cases on collateral review by the Supreme Court that was previously  
8 unavailable, or
- 9
- 10 (B) (I) the factual predicate of the claim could not have been discovered previously  
11 through the exercise of due diligence; and  
12 (ii) the facts underlying the claim, if proven and viewed in light of the evidence  
13 as a whole, would be sufficient to establish by clear and convincing evidence that,  
14 but for constitutional error, no reasonable factfinder would have found the  
15 applicant guilty of the underlying offense.
- 16

17 28 U.S.C. § 2244(b)(2); *see also Moore*, 185 F.3d at 1055.

18 The rules, however, provide an “escape hatch” or safety clause to this procedural bar. A federal  
19 prisoner may file a habeas petition pursuant to § 2241 to contest the legality of his sentence or conviction  
20 where his remedy under § 2255 is inadequate or ineffective to test the legality of his detention. *See*  
21 *Hernandez v. Campbell*, 204 F.3d 861, 864-65 (9th Cir. 2000); *United States v. Pirro*, 104 F.3d 297, 299  
22 (9th Cir. 1997). It is petitioner’s burden to show that section 2255 is an inadequate or ineffective remedy.  
23 *See Charles v. Chandler*, 180 F.3d 753, 756 (6th Cir. 1999); *accord Bryant v. Warden*, 738 F.3d 1253,  
24 1262 (11th Cir. 2013) (citation omitted), *reh’g en banc denied* (11th Cir. May 15, 2014).

25 “This is a stringent burden,” *Garcia-Moreno v. United States*, 2014 WL 1795234, \*2 (C.D. Cal.  
26 Apr. 23, 2014) (citing *Christopher v. Miles*, 342 F.3d 378, 382 (5th Cir. 2003)), and the section 2255  
27 escape hatch is a narrow one. *See Pirro*, 104 F.3d at 299; *accord Jameson v. Samuels*, 555 F. App’x 743,  
28 746 (10th Cir.) (citing *Brace v. US*, 634 F.3d 1167, 1169 (10th Cir. 2011)), *cert. denied*, – U.S. –, 135

1 S. Ct. 307 (2014). Only in “extremely limited circumstances” will section 2255 be considered inadequate  
2 or ineffective. *See Carvalho v. Pugh*, 177 F.3d 1177, 1178 (10th Cir. 1999); *accord Okreke v. United*  
3 *States*, 307 F.3d 117, 120 (3d Cir. 2002); *Marshall v. United States*, 514 F. App’x 936, 937 (11th Cir.)  
4 (Referring to “[t]he narrow exception to the section 2255(e) bar on section 2241 petitions”) (citation  
5 omitted), *cert. denied*, – U.S. –, 133 S. Ct. 2749 (2013).

6 **Section 2255 does not become an inadequate or ineffective remedy merely because** a federal  
7 district court previously denied a section 2255 petition directed at the same conviction / sentence. *See*  
8 *Tripati v. Henman*, 843 F.2d 1160, 1163 (9th Cir. 1988) (citations omitted). “Otherwise, the substantive  
9 and procedural barriers contained in section 2255 would be rendered meaningless and ‘Congress would  
10 have accomplished nothing at all in its attempts – in statutes like AEDPA – to place limits on federal  
11 collateral review.’” *Alaimalo v. United States*, 645 F.3d 1042, 1062-63 (9th Cir. 2011) (citation omitted).

12 Nor does section 2255 become “inadequate or ineffective” merely because the purported “section  
13 2241” claims will be barred (if construed as § 2255 claims) by AEDPA’s strictures on second-or-  
14 successive section 2255 habeas petitions. *See Lorentsen*, 223 F.3d at 953; *Ivy*, 328 F.3d at 1059; *accord*  
15 *US v. Lurie*, 207 F.3d 1075, 1077-78 (8th Cir. 2000). This is because it is the general or generic efficacy  
16 of the section 2255 remedy, “not the personal inability to use it, that is determinative.” *Cradle v. United*  
17 *States*, 290 F.3d 536, 538-39 (3d Cir. 2002) (citing *Garris v. Lindsay*, 794 F.2d 722, 727 (D.C. Cir.  
18 1986)).

19  
20 **Rather, § 2255 may provide an inadequate or ineffective remedy when** the petitioner: (1)  
21 claims actual innocence; and (2) has never had an “unobstructed procedural shot” at presenting the claim.  
22 *See Ivy v. Pontesso*, 328 F.3d 1057, 1060 (9th Cir. 2003) (adopting the two-part test used by other  
23 circuits). In determining whether a petitioner had an unobstructed procedural shot to pursue a claim, the  
24 court examines whether: (1) the legal basis of the claim did not arise until after he exhausted the direct  
25 appeal and § 2255 motion; and (2) the law changed in some way relevant to a petitioner’s claim after the  
26 § 2255 motion. *See Harrison v. Ollison*, 519 F.3d 952, 960 (9th Cir. 2008).

27 Thus, a court must first determine whether jurisdiction is proper, by determining whether the  
28 application is filed pursuant to § 2241 or § 2255, before addressing the merits. *Id.* at 961-62 (affirming

1 dismissal of putative § 2241 petition for lack of jurisdiction because it was actually a § 2255 motion);  
2 *Hernandez*, 204 F.3d at 865 (remanding for district court to conduct a jurisdictional determination).

3  
4 **1. This Petition Does Not Qualify For the Section 2255 “Escape Hatch”**

5 In order for a petitioner to demonstrate that he has never had an unobstructed procedural shot at  
6 presenting his claims, he must establish that he has never had the opportunity to raise them by motion.  
7 *Ivy*, 328 F.3d at 1060. The Court previously found in dismissing the Prior Petition that petitioner not only  
8 had the opportunity to raise, but actually raised, all of the claims contained in the Prior Petition.  
9 Moreover, the Court found that all of the claims in the Prior Petition previously had been denied on the  
10 merits. Petitioner has not alleged anything new in the Petition that was not previously asserted in the  
11 Prior Petition. Accordingly, petitioner had unobstructed procedural shots to pursue his claims on direct  
12 appeal and in his original § 2255 motion.

13  
14 **2. Petitioner’s Prior Opportunity to Argue “Actual Innocence”**

15 Because petitioner has had the opportunity to present his claims, this Court does not need to  
16 decide whether petitioner has presented a viable claim of actual innocence.

17 Accordingly, the petition is a § 2255 motion disguised as a § 2241 habeas petition. As the  
18 custodial court, the Court does not have jurisdiction. Jurisdiction for § 2255 motions lies only in the  
19 district where the petitioner was sentenced, in this case the United States District Court for the District  
20 of South Carolina. *See Hernandez*, 204 F.3d at 864.

21 Given that petitioner previously has pursued a § 2255 motion directed at the same conviction and  
22 has not obtained authorization from the U.S. Court of Appeals to pursue a successive § 2255 motion, it  
23 would be futile for this Court to transfer the matter to the sentencing court. *See Gary A. Hernandez v.*  
24 *United States*, 2014 WL 4180995, \*2 (C.D. Cal. Aug. 20, 2014) (Fairbank, J.) (“Petitioner can file a  
25 Section 2255 motion only in the sentencing court, the Texas District Court. A transfer to the Texas  
26 District Court, as Respondent suggests, would be futile, because the Texas District Court lacks  
27 jurisdiction over a Section 2255 motion until Petitioner obtains authorization to file a second or  
28 successive motion from the Fifth Circuit.”) (internal citation and footnote 1 omitted) (citing *United States*

1 *v. Washington*, 653 F.3d 1057, 1059 (9th Cir. 2011), *cert. denied*, – U.S. –, 132 S. Ct. 1609 (2012)); *see*  
2 *also, e.g., Martin v. Ives*, 2014 WL 1407759, \*5 (C.D. Cal. Apr. 11, 2014) (Fernando Olguin, J.); *Bender*  
3 *v. McGrew*, 2014 WL 1152952, \*5 (C.D. Cal. Mar. 21, 2014) (James Selna, J.); *Escobar v. Clark*, 2007  
4 WL 1100307, \*2 (N.D. Cal. Apr. 12, 2007) (Jeffrey White, J.) (“If Petitioner wishes to pursue claims  
5 attacking her conviction she will have to obtain permission from the Fifth Circuit in order to file another  
6 section 2255 motion in the Western District of Texas. A transfer of this petition to [that district court]  
7 without such permission would be futile.”).

8 Therefore, dismissal of the petition without prejudice for lack of jurisdiction is appropriate.

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10 **ORDER**

11 This action is **dismissed without prejudice** for lack of subject-matter jurisdiction.

12 As required by Fed. R. Civ. P. 58(a), judgment will be entered by separate document.

13  
14 Dated: December 3, 2014



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16 VALERIE BAKER FAIRBANK  
17 Senior United States District Judge  
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