

1 claims that he is entitled to proceed in the CDCA because he has not had an
2 unobstructed procedural shot at presenting such claim.

3 On February 17, 2017, respondent filed a motion (“Respondent’s Motion”)
4 which asserts that relief under 28 U.S.C. § 2241 (“Section 2241”) is not available
5 and that the Petition should be construed as arising under 28 U.S.C. § 2255
6 (“Section 2255”) and either dismissed because it is second or successive or
7 transferred to the NDOK. On March 30, 2017, petitioner filed an opposition to
8 Respondent’s Motion (“Opposition”) which, among other things, explains why
9 petitioner believes he has not had an unobstructed procedural shot at presenting his
10 actual innocence claim and is entitled to do so in the CDCA.

11 On May 11, 2017, petitioner filed a “Demand for Declaratory Judgment with
12 Regard to Questions of Law, Pursuant to 28 U.S.C. § 2201 [the Declaratory
13 Judgment Act],” which he amended on August 2, 2017 (collectively “Demands for
14 Declaratory Judgment”). Also pending before the Court are multiple motions filed
15 by petitioner essentially seeking an expeditious hearing on petitioner’s Demands
16 for Declaratory Judgment (“Other Pending Motions”).¹

17 For the reasons explained below, the Court (1) construes the Petition to be a
18 Section 2255 motion (“Petition/Section 2255 Motion”); (2) concludes that it lacks
19 the requisite jurisdiction to entertain the Petition/Section 2255 Motion; (3) finds
20 that a transfer to the NDOK would be futile; (4) dismisses the Petition/Section
21 2255 Motion without prejudice; (5) denies Respondent’s Motion as moot;
22 (6) denies the Demands for Declaratory Judgment without prejudice for lack of
23 jurisdiction; and (7) denies petitioner’s Other Pending Motions as moot.

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26 ¹The Other Pending Motions consist of (1) a motion and amended motion for a speedy
27 hearing (Docket Nos. 17, 20); (2) requests for “writ[s] of praeceipe,” seeking docketing and
28 scheduling of the foregoing motion/amended motion (Docket Nos. 18, 21); and (3) a “notice” of
petitioner’s “claim of right” to a mandatory judicial determination of the Demands for
Declaratory Judgment (Docket No. 22).

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2 **II. PERTINENT BACKGROUND²**

3 **A. Petitioner’s NDOK Conviction/Sentence and Direct Appeal**

4 In NDOK Case No. 07-CR-195-004-CVE (“NDOK Case”), a jury convicted
5 petitioner of conspiracy to commit mail fraud and wire fraud (18 U.S.C. § 1349
6 (“Section 1349”)) and conspiracy to commit money laundering (18 U.S.C.
7 § 1956(h)). On September 23, 2009, petitioner was sentenced to 262 months in
8 federal prison followed by three years of supervised release. On May 27, 2011, the
9 Tenth Circuit Court of Appeals (“Tenth Circuit”) affirmed petitioner’s conviction
10 and sentence on direct appeal. See United States v. Fishman, 645 F.3d 1175 (10th
11 Cir. 2011), cert. denied, 565 U.S. 1115 (2012).

12 **B. Petitioner’s First NDOK Section 2255 Motion**

13 On October 29, 2012, petitioner filed an amended Section 2255 motion in
14 the NDOK Case (“First NDOK Section 2255 Motion”). Petitioner alleged, among
15 other things, that Section 1349 is not retroactive for conduct prior to its enactment
16 on July 30, 2002, that the operative Second Superseding Indictment charged that
17 the Section 1349 conspiracy began as early as 1998 and continued through August
18 2005, and that petitioner’s conviction for conduct occurring prior to the Section
19 1349 enactment date is unconstitutional. See NDOK Case Docket No. 491 (First
20 NDOK Section 2255 Motion, Ground Two). On February 25, 2015, the NDOK
21 District Court denied the First NDOK Section 2255 Motion in a lengthy decision.
22 See United States v. Fishman, 2015 WL 845586 (NDOK Feb. 25, 2015). It found
23 that Ground Two was procedurally barred because it had been raised on direct
24 appeal and the Tenth Circuit had determined that the government presented
25 sufficient evidence of petitioner’s involvement in the conspiracy after the

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27 ²The Court takes judicial notice of the court dockets and opinions in the below-described
28 proceedings. See Fed. R. Evid. 201; Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th
Cir. 1988) (court may take judicial notice of court records).

1 enactment of Section 1349 to sustain his conviction. See United States v. Fishman,
2 2015 WL 845586, at *14-15; see also United States v. Fishman, 645 F.3d at 1196.

3 On March 30, 2015, petitioner filed a motion in the NDOK Case seeking a
4 certificate of appealability to appeal the District Court’s rejection of the First
5 NDOK Section 2255 Motion, arguing that the District Court had failed to consider
6 his implied argument that the government lacked Article III standing to prosecute
7 him under Section 1349 (the claim asserted in the instant CDCA Petition/Section
8 2255 Motion). See NDOK Case Docket No. 540. On April 1, 2015, the NDOK
9 District Court rejected petitioner’s foregoing contention on procedural grounds and
10 on the merits, stating:

11 To the extent that defendant now argues that the government lacked
12 Article III standing, this argument was not clearly raised in his § 2255
13 motion. Even if the argument was implied, he has not cited a single
14 case that the United States is required to establish Article III standing
15 in the same manner as a civil litigant or that the United States lacks
16 standing to prosecute alleged violations of federal criminal laws when
17 part of the alleged conduct occurred before the statute was enacted.

18 See Petition Ex. A at 2; NDOK Case Docket No. 541.

19 On July 1, 2015, then Tenth Circuit Judge Neil M. Gorsuch, denied
20 petitioner a certificate of appealability, finding that petitioner did not fairly present
21 his claim that the government lacked Article III standing to the NDOK District
22 Court and that the District Court could not be debatably wrong on an issue that was
23 not fairly presented to it. See United States v. Fishman, 608 Fed. Appx. 711, 711
24 (2015), cert. denied, 136 S. Ct. 858 (2016), reh’g denied, 136 S. Ct. 1511 (2016).

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27 **C. Petitioner’s Subsequent NDOK Section 2255 Motions and Tenth**
28 **Circuit Motion for Authorization to File a Second or Successive**

1 **Section 2255 Motion**

2 On June 27, 2016, petitioner filed a motion to dismiss his money laundering
3 conspiracy conviction in the NDOK Case based on Johnson v. United States, 135
4 S. Ct. 2551 (2015). See NDOK Case Docket No. 550. On July 7, 2017, the
5 NDOK District Court construed such motion to be a second or successive Section
6 2255 motion as to which it lacked jurisdiction because petitioner had not received
7 permission from the Tenth Circuit to file a second or successive motion. See
8 United States v. Fishman, 2016 WL 3676584 (NDOK July 7, 2016),
9 reconsideration dismissed, 2016 WL 4587224 (NDOK Sept. 2, 2016). The NDOK
10 District Court declined to transfer the second or successive Section 2255 motion to
11 the Tenth Circuit for authorization. See id., 2016 WL 3676584, at *3; 2016 WL
12 4587224, at *2. Petitioner did not independently apply to the Tenth Circuit for
13 leave to file such a second or successive Section 2255 motion.

14 On January 24, 2017, petitioner filed a motion in the Tenth Circuit (Case
15 No. 17-5009) seeking authorization to file a second or successive Section 2255
16 motion to assert a challenge to the 2009 judgment in the NDOK Case predicated on
17 an alleged Fifth Amendment violation (self-incrimination) during pre-trial
18 proceedings (testimony before the grand jury) pursuant to Vogt v. City of Hays,
19 844 F.3d 1235 (10th Cir. 2017), petition for cert. filed, (No. 16-1495) (June 13,
20 2017). On January 30, 2017, the Tenth Circuit denied such motion. See NDOK
21 Case Docket No. 570.

22 On February 9, 2017, petitioner filed a motion for relief from the judgment
23 in the NDOK Case due to the alleged disparity between the sentences petitioner
24 and a co-defendant were serving. See NDCA Case Docket No 572. On March 28,
25 2017, the NDOK District Court construed such motion to be a second or successive
26 Section 2255 motion and dismissed it for lack of jurisdiction. See United States v.
27 Fishman, 2017 WL 1160578 (NDOK Mar. 28, 2017). Again, the District Court
28 declined to transfer the second or successive Section 2255 motion to the Tenth

1 Circuit for authorization and petitioner did not himself apply to the Tenth Circuit
2 for leave to file such a second or successive Section 2255 motion. Id. at *2.

3 **D. Current Petition/Section 2255 Motion**

4 In the midst of petitioner’s pursuit of the foregoing post-conviction relief in
5 the NDOK and the Tenth Circuit, petitioner, as noted above, filed the instant
6 Petition/Section 2255 Motion in the CDCA on January 10, 2017.

7 **III. DISCUSSION**

8 A federal inmate’s challenge to the legality of his conviction and sentence
9 must generally be filed under Section 2255 in the district in which he was
10 convicted and sentenced, whereas a challenge to the manner, location, or
11 conditions of the execution of the sentence must be brought under Section 2241 in
12 the custodial district. See Hernandez v. Campbell, 204 F.3d 861, 864-65 (9th Cir.
13 2000) (per curiam). A federal prisoner may file a habeas corpus petition pursuant
14 to Section 2241 to contest the legality of his conviction or sentence only where his
15 remedy under Section 2255 is “inadequate or ineffective to test the legality of his
16 detention” – an exception which the Ninth Circuit has called the “escape hatch.”
17 Id.; Stephens v. Herrera, 464 F.3d 895, 897 (9th Cir. 2006), cert. denied, 549 U.S.
18 1313 (2007); see also Marrero v. Ives, 682 F.3d 1190, 1192 (9th Cir. 2012)
19 (discussing same), cert. denied, 568 U.S. 1173 (2013). The exception is narrow.
20 Ivy v. Pontesso, 328 F.3d 1057, 1059 (9th Cir. 2003), cert. denied, 540 U.S. 1051
21 (2003). Section 2255’s remedy is not “inadequate or ineffective” merely because
22 Section 2255’s gatekeeping provisions prevent the petitioner from filing a second
23 or successive petition. Id. (citation omitted). The burden is on the petitioner to
24 show that the remedy is inadequate or ineffective. Redfield v. United States, 315
25 F.2d 76, 83 (9th Cir. 1963). A petitioner may proceed under Section 2241
26 pursuant to the escape hatch when a petitioner claims to be factually innocent of
27 the crime for which he has been convicted and has never had an unobstructed
28 procedural shot at presenting this claim. Ivy v. Pontesso, 328 F.3d at 1060

1 (citation omitted).

2 In this case, petitioner fails to meet his burden to demonstrate that his
3 remedy under Section 2255 is inadequate or ineffective, fails to assert a true claim
4 of factual innocence, and fails to demonstrate that he has never had an
5 unobstructed procedural shot at presenting his claim. Petitioner argues that he is
6 actually innocent of the charges against him because the government allegedly
7 lacked Article III standing to prosecute petitioner for violating Section 1349.
8 Petitioner reasons that there was no statutory authority for the government to
9 prosecute petitioner for his alleged violations of Section 1349 before its enactment,
10 and the government therefore suffered no injury in fact prior to such enactment.
11 Petitioner's contentions are without merit.

12 First, for factual innocence, petitioner must demonstrate that "in light of all
13 the evidence, it is more likely than not that no reasonable juror would have
14 convicted him." See Stephens v. Herrera, 464 F.3d at 898 (citation omitted).
15 Petitioner's claim that the government somehow lacked standing to prosecute
16 petitioner for alleged acts committed prior to the enactment of Section 1349 does
17 nothing to undercut, let alone negate the evidence of petitioner's post-Section 1349
18 enactment acts which the Tenth Circuit found sufficient to sustain petitioner's
19 conviction. See United States v. Fishman, 645 F.3d at 1195.

20 Second, petitioner presented his Article III claim to the NDOK in at least his
21 motion seeking a certificate for a appealability from the denial of the First NDOK
22 Section 2255 Motion. The NDOK District Court expressly addressed and rejected
23 this claim on the merits and on procedural grounds in its order denying a certificate
24 of appealability. Notwithstanding petitioner's disagreement with the NDOK
25 District Court's analysis, he has not shown why such presentation and
26 consideration of the claim on the merits did not constitute an "unobstructed
27 procedural shot" at raising his claim.

28 Third, in any event, the actual innocence escape hatch applies only to claims

1 asserting factual innocence predicated upon a legal change that occurs *after* a
2 petitioner files his or her first Section 2255 motion, Harrison v. Ollison, 519 F.3d
3 952, 960 (9th Cir.) (citations omitted), cert. denied, 555 U.S. 911 (2008), and
4 nothing in the instant Petition/Section 2255 Motion suggests any such change in
5 law rendered noncriminal the conduct for which petitioner was convicted.

6 For these reasons, petitioner may not proceed under Section 2241 and the
7 Court construes the Petition/Section 2255 Motion as arising under Section 2255.
8 This Court does not have jurisdiction to consider petitioner’s Petition/Section 2255
9 Motion because it must be brought in the district in which he was convicted or
10 sentenced. Hernandez, 204 F.3d at 865.

11 Pursuant to 28 U.S.C. section 1631, a court lacking jurisdiction over a matter
12 shall, if it is in the interest of justice, transfer such to a court with jurisdiction. In
13 this case, the Court finds that transferring this action to the NDOK– the court with
14 jurisdiction – would be futile because the Tenth Circuit has not granted petitioner
15 leave to file a successive Section 2255 motion and indeed has already denied one
16 such request, albeit one involving a different claim than that currently asserted by
17 petitioner. A successive Section 2255 motion cannot be entertained by the NDOK
18 unless and until authorized by the Tenth Circuit. See
19 28 U.S.C. §§ 2244(a), 2244(b)(3), 2255(h). Accordingly, it is appropriate to
20 dismiss this matter without prejudice to any relief to which petitioner may be
21 entitled in the NDOK or the Tenth Circuit should the Tenth Circuit grant him leave
22 to file a successive Section 2255 motion.

23 As for petitioner’s Demands for Declaratory Judgment, the Court may not
24 grant such demands due to lack of jurisdiction. “Article III of the Constitution
25 limits federal courts to the adjudication of actual, ongoing controversies between
26 litigants.” Deakins v. Monaghan, 484 U.S. 193, 199 (1988) (citations omitted).
27 “[F]ederal courts may not ‘give opinions upon moot questions or abstract
28 propositions.” Calderon v. Moore, 518 U.S. 149, 150 (1996) (per curiam) (quoting

1 Mills v. Green, 159 U.S. 651, 653 (1895)). Petitioner’s Demands for Declaratory
2 Judgment do no more than request that the Court declare abstract legal
3 propositions. The Court may not do so. Additionally, in light of the Court’s ruling
4 that it lacks jurisdiction to consider the Petition/Section 2255 Motion, there is no
5 ongoing case or controversy before the Court that would permit the Court to grant
6 petitioner’s Demands for Declaratory Judgment even if they did not concern
7 abstract legal propositions.

8 Finally, in light of the above, petitioner’s Other Pending Motions are moot
9 and are denied as such.

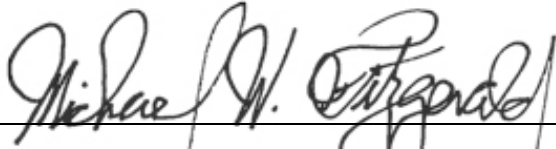
10 **IV. ORDERS**

11 IT IS THEREFORE ORDERED:

- 12 1. The Petition/Section 2255 Motion is construed as a motion arising
13 under Section 2255 and is dismissed without prejudice for lack of
14 jurisdiction.
- 15 2. Petitioner’s Demands for Declaratory Judgment are denied for lack of
16 jurisdiction.
- 17 3. Petitioner’s Other Pending Motions are denied as moot.

18 IT IS SO ORDERED.

19 DATED: September 15, 2017

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23 HONORABLE MICHAEL W. FITZGERALD
24 UNITED STATES DISTRICT JUDGE
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