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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ANTHONY EARL MITCHELL,) Case No. CV 06-04153 DDP (AGR)
)
Petitioner,)
) **ORDER GRANTING IN PART AND**
) **DENYING IN PART RESPONDENT'S**
v.) **MOTION TO DISMISS**
)
B.G. COMPTON, WARDEN,) [Petition filed on June 26, 2006]
)
Respondent.)
_____)

This matter comes before the Court on Respondent's Motion to Dismiss Petitioner Anthony Earl Mitchell's pro se petition for writ of habeas corpus by a person in federal custody filed under 28 U.S.C. § 2241. The issue presented is whether the "savings clause" of 28 U.S.C. § 2255 is applicable to this case. The Court finds that the § 2255 savings clause does apply as concerns Petitioner's claim of actual innocence. After reviewing the papers submitted by the parties, the Court grants in part Respondent's Motion to Dismiss and denies the Motion as concerns Petitioner's claim of actual innocence.

///

1 **I. LEGAL STANDARD**

2 Petitioner seeks to bring a petition for writ of habeas
3 corpus under 28 U.S.C. § 2241 to challenge the legality of his
4 conviction. Petitioner can only bring a § 2241 petition, however,
5 if the "savings clause" of 28 U.S.C. § 2255 is applicable to
6 Petitioner's case.

7 In general, "§ 2255 provides the exclusive procedural
8 mechanism by which a federal prisoner may test the legality of
9 detention." Lorentsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000).
10 Section 2255 allows a federal prisoner claiming that his sentence
11 or conviction was imposed "in violation of the Constitution or laws
12 of the United States" to "move the court which imposed the sentence
13 to vacate, set aside or correct the sentence." 28 U.S.C. § 2255.
14 The Anti-Terrorism and Effective Death Penalty Act of 1996
15 ("AEDPA") added "gatekeeping" provisions to § 2255, which restricts
16 when such petitions may be filed. Namely, petitions are subject to
17 a one-year statute of limitations, and further, if the sentencing
18 court denies a petitioner's § 2255 motion, any subsequent § 2255
19 motion must be denied as a second or successive petition unless the
20 court of appeals certifies the motion.¹

22 ¹ After once filing a § 2255 petition, a prisoner may not
23 bring a second or successive § 2255 motion in district court unless
24 "a panel of the appropriate court of appeals" certifies that the
25 motion contains:

- 25 (1) newly discovered evidence that, if proven and viewed in
26 light of the evidence as a whole, would be sufficient to
27 establish by clear and convincing evidence that no reasonable
28 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.
28 U.S.C. § 2255.

1 Traditional habeas corpus petitions filed under § 2241 are
2 generally unavailable to federal prisoners wishing to challenge the
3 legality of their convictions. See 28 U.S.C. § 2255. Instead, a
4 prisoner may file a § 2241 petition, in the district in which he or
5 she is incarcerated, only to challenge the manner, location, or
6 conditions of a sentence's execution. See Hernandez v. Campbell,
7 204 F.3d 861, 864 (9th Cir. 2000). Therefore, normally Petitioner
8 would not be able to file a § 2241 motion to challenge, as he does
9 here, the legality of his conviction.

10 There is, however, an exception contained in § 2255 that
11 allows a federal prisoner to file a § 2241 habeas petition to
12 challenge the legality of a sentence when the prisoner's remedy
13 under § 2255 is "inadequate or ineffective to test the legality of
14 his detention." 28 U.S.C. § 2255. The Ninth Circuit "refer[s] to
15 this provision of § 2255 as the 'savings clause,'" Hernandez, 204
16 F.3d at 864 n.2, or the "escape hatch," Stephens v. Herrera, 464
17 F.3d 895, 897 (9th Cir. 2006) (internal quotation marks omitted).
18 In the instant case, Petitioner seeks to file a § 2241 petition
19 because any further § 2255 motions would be denied as a second or
20 successive motion or as untimely. A motion that would otherwise be
21 barred as second or successive if filed under § 2255 may be filed
22 under § 2241 with no adverse consequences to petitioner.² See In
23 re Dorsainvil, 119 F.3d 245, 252 (3d Cir. 1997) (sentencing court's

24
25 ² AEDPA also limits second and successive § 2241 habeas
26 petitions brought by federal prisoners. See 28 U.S.C. 2244(a).
27 However, Petitioner has to this point filed only § 2255 petitions.
28 The instant § 2241 petition is thus not barred. Cf. Chambers v.
United States, 106 F.3d 472, 475 (2d Cir. 1997) ("Because Sections
2255 and 2241 address different types of claims, filing a Section
2255 motion after filing a Section 2241 motion does not trigger the
gatekeeping provision of Section 2244.").

1 denial of motion for certification to file a successive § 2255
2 petition is "without prejudice to [petitioner's] right to file a
3 petition . . . pursuant to 28 U.S.C. § 2241 in a district court in
4 the district of his confinement."). Thus, if Petitioner's
5 situation falls under the § 2255 savings clause, his Petition is
6 not barred by the gatekeeping provisions of § 2255, and therefore
7 may proceed.

8

9 **III. BACKGROUND**

10 On November 10, 1992, a jury convicted Petitioner of cocaine
11 base possession with intent to distribute in violation of 21 U.S.C.
12 §§ 841(a)(1) and (b)(1)(A), and using or carrying a firearm in
13 relation to a drug trafficking crime in violation of 18 U.S.C. §
14 924(c)(1).³ (Pet. at 1, 3, Ex. 1 at 1-2.) On March 11, 1993, the

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16 ³ 18 U.S.C. § 924(c)(1) states:

17 Except to the extent that a greater minimum sentence is
18 otherwise provided by this subsection or by any other
19 provision of law, any person who, during and in relation
20 to any crime of violence or drug trafficking crime
21 (including a crime of violence or drug trafficking crime
22 that provides for an enhanced punishment if committed by
23 the use of a deadly or dangerous weapon or device) for
24 which the person may be prosecuted in a court of the
25 United States, uses or carries a firearm, or who, in
26 furtherance of any such crime, possesses a firearm,
27 shall, in addition to the punishment provided for such
28 crime of violence or drug trafficking crime-

(i) be sentenced to a term of imprisonment of not less
than 5 years;

(ii) if the firearm is brandished, be sentenced to a term
of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a
term of imprisonment of not less than 10 years.

Id. (emphasis added).

28

(continued...)

1 District Court for the Western District of Louisiana ("sentencing
2 court") sentenced Petitioner to 188 months in prison for the drug
3 trafficking crime and 60 months in prison for the firearm
4 enhancement, with the two sentences to run consecutively. (Pet.
5 Ex. 1 at 4.) The Fifth Circuit Court of Appeals affirmed
6 Petitioner's conviction on direct appeal in November 1993. (Pet.
7 at 3.)

8 On April 28, 1997, Petitioner, proceeding pro se, filed a
9 document entitled "Motion to Extend Filing Deadline of Motion to
10 Vacate Judgment of Conviction and Sentence Pursuant to 28 U.S.C. §
11 2255" ("Initial § 2255 Motion"). The sentencing court, without
12 explanation, denied the motion in a brief order on July 7, 1997.
13 (Pet. Ex. G1 at 2.) On April 21, 2000, Petitioner filed a second
14 document entitled "Motion for Leave of Court to File Out of Time
15 Appeal Under Title 28 U.S.C. § 2255" ("Subsequent § 2255 Motion").
16 (Pet. Ex. G2.) On November 20, 2000, the sentencing court likewise
17 denied this Subsequent § 2255 Motion, concluding that it was
18 untimely under the Anti-Terrorism and Effective Death Penalty Act
19 of 1996 ("AEDPA") one-year statute of limitations.⁴ (Pet. Ex. G1

20
21 ³(...continued)

22 ⁴ Under AEDPA, federal prisoners are required to bring a
23 collateral attack under § 2255 within one year of the date their
24 conviction becomes final. See 28 U.S.C. § 2255. Like all
25 defendants whose convictions became final before AEDPA's enactment,
26 Petitioner was entitled to a one-year grace period after AEDPA's
27 effective date to file his § 2255 motion. See Patterson v.
28 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). That period expired
on April 29, 1997. Petitioner's Subsequent § 2255 motion, filed on
April 21, 2000, was filed well beyond the expiration of the statute
of limitations. Moreover, a separate one-year extension of time is
allowed when a defendant seeks to bring a § 2255 motion based on a
new right the Supreme Court has recognized to apply retroactively

(continued...)

1 at 3.) However, the sentencing court commented that "even if this
2 court may not entertain his § 2255 Motion, relief may be available
3 under § 2241 in the district court" under the savings clause.⁵

4 (Pet.

5 Ex. G1 at 8.) On September 14, 2001, the Fifth Circuit Court of
6 Appeals denied Petitioner's request for a Certificate of
7 Appealability ("COA") of the denial of his Subsequent § 2255
8 Motion. (Pet. Reply at 6.)

9 Petitioner was sent to the Federal Correctional Institution-
10 Lompoc, in Lompoc, California, and from there, proceeding pro se,
11 filed the instant motion on June 26, 2006. Respondent filed a
12 Motion to Dismiss the instant petition on November 13, 2006.
13 Petitioner filed a reply to Respondent's Motion to Dismiss on
14 December 7, 2006.

15
16 **IV. DISCUSSION**

17 The instant Petition raises four grounds for relief: (1)
18 Petitioner is actually innocent of the crime of using or carrying a
19 firearm in connection with a drug trafficking charge under 18
20 U.S.C. § 924(c)(1), per the holding of Bailey v. United States, 516

21 _____
22 ⁴(...continued)
23 to cases on collateral review. 28 U.S.C. § 2255(f)(3). The
24 limitations period for such claims is one year from the recognition
25 of the new right. Id. Petitioner, to argue his claim of actual
26 innocence, relies upon a statutory rule made retroactive in Bousley
v. United States, 523 U.S. 614, 620 (1998), a case decided on May
18, 1998. Accordingly, Petitioner's initial § 2255 motion was
filed before the decision in Bousley, but his subsequent § 2255
petition was filed more than a year after the 1998 decision.

27 ⁵ Additionally, the court held Petitioner was not entitled to
28 equitable tolling as to his claims. (Pet. Ex. G1 at 6.) In the
instant Petition, Petitioner does not seek equitable tolling.

1 U.S. 137 (1995); (2) the sentencing court made an improper
2 constructive amendment to the conspiracy indictment in its charge
3 to the jury; (3) the sentencing court divested itself of
4 jurisdiction by giving an improper indictment to the jury; and (4)
5 Petitioner received ineffective assistance of trial and appellate
6 counsel. (Pet. at 5-6.)

7 For the reasons detailed below, this Court finds the savings
8 clause of § 2255 applicable to claim one of the instant Petition.

9
10 **A. The § 2255 Savings Clause Applies and Petitioner's § 2241**
11 **Petition May Proceed as to the Actual Innocence Claim**

12 The Court must decide the threshold question of whether the
13 instant Petition was properly filed pursuant to 28 U.S.C. § 2241,
14 or whether it must instead be filed as a 28 U.S.C. § 2255 motion in
15 the Western District of Louisiana. See Hernandez, 204 F.3d at 865-
16 66. If the Petition falls under § 2255's savings clause, then it
17 is properly characterized as a § 2241 petition and this Court
18 possesses jurisdiction over it. However, if the savings clause
19 does not come into play, then the Petition must be construed as a
20 petition under § 2255, and jurisdiction lies only in the Western
21 District of Louisiana, where Petitioner was sentenced. Id.

22 As discussed in greater detail below, this Court finds the
23 savings clause of § 2255 is applicable to the instant Petition, but
24 only as to Petitioner's claims of actual innocence. Thus, although
25 the Petition challenges the legality of Petitioner's conviction, it
26 is correctly filed as a § 2241 motion.
27
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1 Respondent contends that Petitioner failed to take advantage
2 of an unobstructed procedural opportunity at presenting his claim
3 of actual innocence. However, Respondent fails to account for
4 Petitioner's Initial § 2255 Motion, which barred any subsequent
5 filing under § 2255 as a second or successive petition. Taking the
6 Initial § 2255 Motion into consideration, this Court finds that the
7 instant Petition meets the stringent requirements the Ninth Circuit
8 has outlined for application of the savings clause.

9 Petitioner was convicted in 1992 of violating § 924(c) by
10 "using or carrying" a firearm during the commission of a drug
11 trafficking crime. In Bailey v. United States, 516 U.S. 137, 143
12 (1995), the Supreme Court interpreted the "use" prong of § 924(c)
13 as requiring "more than mere possession of a firearm by a person
14 who commits a drug offense." The Court explained that "§ 924(c)(1)
15 requires evidence sufficient to show an *active employment* of the
16 firearm by the defendant, a use that makes the firearm an operative
17 factor in relation to the predicate offense." Id. Thus, the High
18 Court held that "mere possessors [of firearms] convicted before
19 Bailey of use really were convicted of a nonexistent crime[.]" In
20 re Davenport, 147 F.3d 605, 611 (7th Cir. 1998). In Bousley, 523
21 U.S. at 620, the Supreme Court held that the Bailey decision would
22 apply retroactively to cases on collateral review.

23 Accordingly, under the current standard, to prove that a
24 defendant possessed a firearm in furtherance of a drug trafficking
25 crime in violation of § 924(c)(1), the government must show that
26 (1) the defendant participated in the conspiracy to traffic in
27 drugs; (2) the defendant possessed the firearm; and (3) defendant's
28 possession of the firearm was "in furtherance" of the drug

1 trafficking conspiracy. See United States v. Rios, 449 F.3d 1009,
2 1012 (9th Cir. 2006); United States v. Mann, 389 F.3d 869, 879 (9th
3 Cir. 2004). In the post-Bailey era, mere possession of a firearm
4 by an individual convicted of a drug crime is not sufficient for a
5 rational trier of fact to convict under § 924(c)(1). See Mann, 389
6 F.3d at 879-80; United States v. Krouse, 370 F.3d 965, 967 (9th
7 Cir. 2004). Instead, the government must show that the defendant
8 intended to use the firearm to promote or facilitate the drug
9 crime. See Krouse, 370 F.3d at 967. Finally, the Ninth Circuit
10 does not permit reliance solely on the nature of the firearms
11 themselves. See Mann, 389 F.3d at 880 (holding that the possession
12 of "inherently dangerous" firearms that are "generally lacking in
13 usefulness except for violent and criminal purposes" does not
14 satisfy the "in furtherance of" element of § 924(c)(1)).

15
16 The Ninth Circuit has held that a motion meets the savings
17 clause criteria of § 2255 "when a petitioner (1) makes a claim of
18 actual innocence, and (2) has not had an 'unobstructed procedural
19 shot' at presenting that claim." Stephens, 464 F.3d at 898
20 (internal citations omitted). In determining whether a petitioner
21 had an unobstructed procedural shot to pursue his claim, the court
22 must ask whether petitioner's claim "did not become available"
23 until after the sentencing court's decision. Id. at 898. In other
24 words, this Court considers: "(1) whether the legal basis for
25 petitioner's claim 'did not arise until after he had exhausted his
26 direct appeal and first § 2255 motion;' and (2) whether the law
27 changed 'in any way relevant' to petitioner's claim after his first
28 § 2255 motion." See Harrison, 519 F.3d at 960 (quoting Ivy v.

1 Pontesso, 328 F.3d 1057, 1060-61 (9th Cir. 2003)). Petitioner's
2 situation meets these narrow criteria.

3 First, Petitioner has made a good faith claim of actual
4 innocence. "To establish actual innocence, petitioner must
5 demonstrate that, 'in light of all the evidence, it is more likely
6 than not that no reasonable juror would have convicted him.'" Bousley,
7 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298,
8 327-28 (1995)). "'Actual innocence' means factual innocence, not
9 mere legal insufficiency." Id. Petitioner has shown that the
10 Government's witnesses at trial testified that they never observed
11 a gun on Petitioner's person. (Pet. Ex. A, B.) Petitioner has
12 thus presented a valid basis for his claim of actual innocence.

13 Second, the legal basis for Petitioner's instant innocence was
14 not available previously. Petitioner's appeal was denied in 1993,
15 and his Initial § 2255 Motion was denied in 1997. Petitioner was
16 unable to raise his Bailey innocence claim in either motion because
17 it was not until 1998 that Bousley made Bailey retroactive.
18 Accordingly, the legal basis for Petitioner's actual innocence
19 claim did not become available until after the exhaustion of his
20 direct appeal and the denial of his Initial § 2255 Motion.
21 Furthermore, the Bousley decision fundamentally changed the law
22 relevant to Petitioner's innocence claim. Prior to Bousley, it was
23 unclear whether Bailey applied retroactively. See United States v.
24 Lorentsen, 106 F.3d 278, 279 (9th Cir. 1997) (noting that a
25 decision on Bailey's retroactivity "has not yet been made by the
26 Supreme Court[.]").

27 Respondent argues that Petitioner cannot invoke the savings
28 clause because he had an "unobstructed procedural shot" at bringing

1 his innocence claim and failed to take advantage of it. (Resp't
2 Mot. to Dismiss at 6.) Respondent contends that Petitioner had one
3 year after the 1998 Bousley decision to bring his claim, but that
4 he neglected to do so until his untimely Subsequent § 2255 Motion
5 in 2000. (Resp't Mot. to Dismiss at 6-7.) However, Respondent's
6 argument fails to recognize that Petitioner's Initial § 2255 Motion
7 was filed in 1997, a year before Bousley. Petitioner therefore
8 could not have presented his Bailey innocence claim in his Initial
9 § 2255 Motion. Further, Respondent errs to the extent he argues
10 that Petitioner could have obtained certification to file a second
11 or successive petition after Bousely. As discussed, such
12 certification is authorized only upon a showing of newly discovered
13 evidence or a retroactive new rule of constitutional law. 28
14 U.S.C. § 2255. Bailey and Bousely, however, announced a new
15 statutory rule. See Lorentsen, 106 F.3d at 279 (stating that
16 Supreme Court decision in Bailey announced a new statutory
17 interpretation). Therefore, because his Initial § 2255 Motion was
18 denied in 1997, Petitioner lacked the opportunity to bring his
19 innocence claim until the instant § 2241 Petition.

20 Respondent does not appear to recognize that Petitioner's
21 Initial § 2255 Motion was in fact a § 2255 petition. Although this
22 pro se motion was entitled "Motion to Extend Filing Deadline of
23 Motion to Vacate Judgment of Conviction and Sentence Pursuant to 28
24 U.S.C. § 2255," a review of the motion's substance shows that it
25 itself sought to vacate Petitioner's allegedly "unlawful sentence
26 and deprivation of his liberty[.]" (Initial § 2255 Mot. at 1.)
27 Petitioner wrote:

28 For the reason of instant petition, Petitioner Mitchell claims

1 that his conviction and sentence [were] obtain[ed] in
2 violation of the laws of the United States; and he seek[s]
relief from the unlawful sentence and deprivation of his
liberty[.]

3 (Initial § 2255 Mot. at 1 (emphasis added).)

4 To the extent that the motion is ambiguous, the Court adheres
5 to the general rule that pro se complaints and motions from
6 prisoners are to be liberally construed. See, e.g., Resnick v.
7 Hayes, 213 F.3d 443, 447 (9th Cir. 2000) (“[C]ourts must construe
8 pro se pleadings liberally.”); Frost v. Symington, 197 F.3d 348,
9 352 (9th Cir. 1999). As such, courts have occasionally
10 characterized pro se prisoner motions as motions under 28 U.S.C. §
11 2255, where such a construction would benefit the petitioner. See,
12 e.g., United States v. Johnson, 988 F.2d 941, 943 (9th Cir. 1993)
13 (construing motion brought under Fed. R. Crim. P. 35(a) as one
14 under 28 U.S.C. § 2255); United States v. Young, 936 F.2d 1050,
15 1052 (9th Cir. 1991) (same); see also Stantini v. United States,
16 140 F.3d 424, 426 (2d Cir. 1998) (characterizing a prisoner’s
17 earlier purported § 2255 motion as a § 2241 habeas corpus motion).
18 Under the circumstances here, this Court construes Petitioner’s
19 1997 motion as a § 2255 motion challenging the legality of his
20 sentence. Cf. United States v. Seesing, 234 F.3d 456, 463 (9th
21 Cir. 2000) (rejecting characterization of a prisoner’s letter as a
22 § 2255 motion when it was to prisoner’s disadvantage).

23 While the sentencing court correctly denied Petitioner’s
24 Subsequent § 2255 Motion as untimely, it did not address the fact
25 that the motion was a second or successive petition, which would
26 have provided an alternative basis for denial. As noted,
27 Petitioner could not have obtained certification to file a
28

1 successive motion because the Bailey decision "announced only a new
2 statutory interpretation, not a new rule of constitutional law."
3 United States v. Lorentsen, 106 F.3d at 279. Therefore,
4 Petitioner's Subsequent § 2255 Motion was doomed from the start as
5 inadequate to address his innocence claim.

6 A number of courts have held that a claim of actual innocence
7 entitles a petitioner who is procedurally barred from filing a
8 second or successive motion under § 2255 to seek relief under §
9 2241. See Reyes-Requena v. United States, 243 F.3d 893, 903 (5th
10 Cir. 2001); In re Jones, 226 F.3d 328, 334 (4th Cir. 2000); In re
11 Davenport, 147 F.3d at 609-11; Triestman v. United States, 124 F.3d
12 361,363 (2d Cir. 1997); In re Dorsainvil, 119 F.3d 245, 251 (3d
13 Cir. 1997). Each of these cases involved petitioners who had filed
14 their first § 2255 motions prior to Bailey, thus barring any
15 subsequent § 2255 motions as second or successive petitions. Each
16 court held the § 2255 savings clause allowed the petitioner to use
17 § 2241 to present his claims.

18 Like the petitioners in those cases, Petitioner here also
19 lacked an "unobstructed procedural shot" at presenting his claim of
20 actual innocence. Petitioner was convicted in 1992, lost his
21 appeal in 1993, and filed his Initial § 2255 Motion in 1997, a year
22 prior to Bousley, which held Bailey retroactive. Petitioner's
23 Subsequent § 2255 Motion, filed in 2000, was denied as untimely,
24 and in any event was procedurally barred as a second or successive
25 petition. Petitioner thus "had no reasonable opportunity, either
26 when he was convicted and appealed or later when he filed a motion
27 for postconviction relief under section 2255, to challenge the
28 legality of his conviction." In re Davenport, 147 F.3d at 610.

1 Accordingly, the savings clause of § 2255 applies to
2 Petitioner's claim of actual innocence. Since this claim is
3 properly presented as a § 2241 habeas petition, any issues relating
4 to untimeliness under § 2255 are moot. This claim of may proceed.⁶

5
6 **B. The Savings Clause Does Not Apply to Grounds Two, Three,
7 and Four**

8 Respondent contends that Petitioner's remaining claims are
9 time-barred and must be dismissed. Petitioner's second and third
10 grounds for relief, challenging the manner in which the sentencing
11 court presented the indictment to the jury, and his fourth ground,
12 alleging inadequate assistance of trial and appellate counsel, do
13 not involve claims of actual innocence. As such, they do not
14 qualify for the § 2255 savings clause. See Ivy, 328 F.3d at 1059-
15 61. Petitioner had an "unobstructed procedural shot" at presenting
16 these claims in his Initial § 2255 Motion.⁷ Moreover, Petitioner
17 presented nearly identical claims in his Subsequent § 2255 Motion.
18 (Pet. Ex. G2.) Petitioner has failed to show that his remedy
19 under § 2255 is "inadequate or ineffective" to test the legality of

20
21 ⁶ As an additional ground for dismissal, Respondent argues
22 that equitable tolling does not apply to any of Petitioner's
23 claims. (Resp't Mot. to Dismiss at 9.) Respondent also requests
24 that this Court deny any motion for a COA. (Resp't Mot. to Dismiss
25 at 9.) This argument is predicated on construing the instant
26 Petition as a § 2255 motion. The Petitioner did not raise an
27 equitable tolling argument, and does not request a COA. Since this
28 Court construes the instant Petition as one brought under § 2241,
Respondent's equitable tolling argument and request for a denial of
a COA are moot.

⁷In his Initial § 2255 Motion, Petitioner raised, among
others, the claims of: (1) ineffective assistance of counsel; (2)
error in the jury instruction; and (3) that the evidence at trial
was not properly presented at sentencing. (Initial § 2255 Mot. at
3.)

1 these three grounds for relief. See Ivy, 328 F.3d at 1059
2 (“[Section] 2255's remedy is not ‘inadequate or ineffective’ merely
3 because § 2255's gatekeeping provisions prevent the petitioner from
4 filing a second or successive petition.”).

5 Therefore, the savings clause is inapplicable and Petitioner
6 must assert these claims under § 2255. The Ninth Circuit has held
7 that a petitioner may not circumvent the limitations imposed on
8 successive petitions by styling his petition as one pursuant to §
9 2241 rather than § 2255. See Moore v. Reno, 185 F.3d 1054, 1055
10 (9th Cir. 1999) (per curiam). Because these claims cannot be
11 brought under § 2241, jurisdiction lies only with the sentencing
12 court in Louisiana. 28 U.S.C. § 2255. Therefore, these claims are
13 dismissed for lack of jurisdiction.

14

15 **V. Conclusion**

16 For the foregoing reasons, this Court finds that the § 2255
17 savings clause applies as concerns Petitioner's claim of actual
18 innocence. Petitioner's remaining claims, which do not involve
19 actual innocence, are hereby DISMISSED for lack of jurisdiction.
20 Accordingly, this Court GRANTS Respondent's Motion to Dismiss as to
21 claims two, three, and four of Petition, and DENIES Respondent's
22 Motion to Dismiss as to Petitioner's claim of actual innocence.

23

24 IT IS SO ORDERED.

25 Dated: August 27, 2008

26

27

28



DEAN D. PREGERSON

United States District Judge