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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LORENZO FOSSELMAN, JR.,)	1:07-CV-00812 LJO NEW (DLB) HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATION
)	REGARDING PETITION FOR WRIT OF
v.)	HABEAS CORPUS
)	
)	
M. S. EVANS, Warden,)	
)	
Respondent.)	

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This action has been referred to this Court pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72-302.

On June 4, 2007, Petitioner filed the instant petition for writ of habeas corpus in this Court. The petition raises the following four grounds for relief: 1) "Failure of trial court to adequately inquire into Petitioner's conflict of interest claim was an abuse of discretion violating Petitioner's 6th and 14th Amendment rights protected by the United States Constitution"; 2) "Ineffective assistance of counsel"; 3) "Petitioner's 1997 plea waiver was unconstitutional and therefore invalid and could not be used to enhance his present sentence to life"; 4) "Petitioner's present sentence of life by use of 1997 prior conviction is a violation of due process and equal protection of the United States

1 Constitution”; 5) “Ineffective assistance of appellate counsel denies Petitioner his 6th and 14th
2 amendment rights guaranteed under the United States Constitution.”

3 **DISCUSSION**

4 A. Procedural Grounds for Summary Dismissal

5 Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

6 If it plainly appears from the petition and any attached exhibits that the petitioner is not
7 entitled to relief in the district court, the judge must dismiss the petition and direct the clerk
8 to notify the petitioner.

9 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of
10 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to
11 dismiss, or after an answer to the petition has been filed. A petition for habeas corpus should not be
12 dismissed without leave to amend unless it appears that no tenable claim for relief can be pleaded
13 were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

13 B. Inappropriate Grounds for Relief

14 Petitioner’s Grounds Three, Four and part of Five center on his 1997 conviction. However,
15 Petitioner is serving a sentence for his 2002 convictions for carjacking and evading a peace officer.
16 Petitioner’s 1997 conviction is not open to challenge. In Lackawanna County Dist. Attorney v. Ross,
17 532 U.S. 394, 403-404 (2001), *citing* Daniels v. United States, 532 U.S. 374 (2001), the United
18 States Supreme Court held that “once a state conviction is no longer open to direct or collateral
19 attack in its own right because the defendant failed to pursue those remedies while they were
20 available (or because the defendant did so unsuccessfully), the conviction may be regarded as
21 conclusively valid. . . . If that conviction is later used to enhance a criminal sentence, the defendant
22 generally may not challenge the enhanced sentence through a petition under § 2254 on the ground
23 that the prior conviction was unconstitutionally obtained.”

24 **RECOMMENDATION**

25 Accordingly, the Court HEREBY RECOMMENDS that Grounds Three, Four, and part of
26 Ground Five be DISMISSED from the petition for writ of habeas corpus with prejudice.

27 This Findings and Recommendation is submitted to the Honorable Lawrence J. O’Neill,
28 United States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and

