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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GABRIEL MENDEZ,
Petitioner,

v.

WARREN MONTGOMERY,
Warden,
Respondent.

NO. CV 16-8261-ODW (AGR)

OPINION AND ORDER ON
PETITION FOR WRIT OF
HABEAS CORPUS
(SUCCESSIVE PETITION)

On November 7, 2016, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. Petitioner challenges his continued imprisonment for a 1990 plea-bargained murder conviction and sentence of 16 years to life. Because he previously challenged the same underlying state-court judgment here in a habeas action that the Court dismissed with prejudice, and because he lacks Ninth Circuit authorization for another such challenge, the Court lacks jurisdiction over the new petition.

I.

PROCEDURAL BACKGROUND

Pursuant to Fed. R. Evid. 201, the Court takes judicial notice of the records in Petitioner’s prior federal habeas corpus actions in the Central District.

1 The Petition indicates that Petitioner was convicted of murder, with a gun-
2 use enhancement, in 1990 when he entered a no-contest plea. He was
3 sentenced to prison for 16 years to life. (Petition at 2.)

4 On December 8, 2006, petitioner filed a Petition for Writ of Habeas Corpus
5 in this Court in case number CV 06-7810-GPS (AGR) (*Mendez I.*). Petitioner
6 challenged the same 1990 state court judgment. On January 16, 2008, the Court
7 accepted the Magistrate Judge's Report And Recommendation and denied the
8 habeas petition with prejudice as untimely. On October 6, 2008, the Court denied
9 a certificate of appealability. (Dkt. Nos. 37, 42, 43, 47 in *Mendez I.*) Petitioner
10 filed a Notice of Appeal, but the Ninth Circuit denied a certificate of appealability.
11 (Dkt. Nos. 46, 50 in *Mendez I.*)

12 On November 7, 2016, Petitioner filed the current Petition. Petitioner
13 challenges the same 1990 judgment, specifically asserting that his imprisonment
14 on the 16-years-to-life sentence violates the Eighth Amendment.

15 II.

16 DISCUSSION

17 The Petition was filed after enactment of the Antiterrorism and Effective
18 Death Penalty Act of 1996 ("AEDPA"). Therefore, the Court applies the AEDPA
19 in reviewing the Petition. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

20 The AEDPA provides, in pertinent part: "Before a second or successive
21 application permitted by this section is filed in the district court, the applicant shall
22 move in the appropriate court of appeals for an order authorizing the district court
23 to consider the application." 28 U.S.C. § 2244(b)(3)(A). A district court does not
24 have jurisdiction to consider a "second or successive" petition absent
25 authorization from the Ninth Circuit. *Burton v. Stewart*, 549 U.S. 147, 152 (2007);
26 *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001) ("When the AEDPA is in
27 play, the district court may not, in the absence of proper authorization from the
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1 court of appeals, consider a second or successive habeas application.”) (citation
2 and quotation marks omitted).

3 Here, the Petition is a second or successive petition challenging the same
4 conviction and sentence imposed by the same judgment of the state court as in
5 *Mendez I. See McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009) (“We hold
6 that the dismissal of a habeas petition as untimely constitutes a disposition on the
7 merits and that a further petition challenging the same conviction would be
8 ‘second or successive’ for purposes of 28 U.S.C. § 2244(b).”), *followed by*
9 *Brandon v. Los Angeles County Sup. Ct.*, No. 15-2187-CAS, 2015 WL 1541567,
10 *3 (C.D. Cal. April 2, 2015) (same).

11 Rule 4 of the Rules Governing Section 2254 Cases in the United States
12 Courts provides that “[i]f it plainly appears from the face of the petition and any
13 attached exhibits that the petitioner is not entitled to relief in the district court, the
14 judge must dismiss the petition and direct the clerk to notify the petitioner.” Here,
15 summary dismissal is warranted.

16 **III.**

17 **ORDER**

18 IT IS HEREBY ORDERED that Judgment be entered summarily dismissing
19 the Petition and action for lack of subject matter jurisdiction.

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22 DATED: _November 14, 2016

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25 OTIS D. WRIGHT II
26 United States District Judge
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