

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 2:17-cv-05062-JGB-KS Date: July 13, 2017

Title Edgardo O. Mena v. William Muniz

Present: The Honorable: Karen L. Stevenson, United States Magistrate Judge

Roxanne Horan-Walker

Deputy Clerk

N/A

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Proceedings: (IN CHAMBERS) ORDER TO SHOW CAUSE RE: DISMISSAL

On July 10, 2017, Petitioner, a California state prisoner proceeding *pro se*, and *in forma pauperis*, filed a Petition For Writ Of Habeas Corpus By A Person In State Custody (“Petition”) pursuant to 28 U.S.C. § 2254. According to the Petition, Petitioner was convicted on March 16, 2012 of sexual assault and related charges. (Petition at 2.) The Petition and its attachments indicate that Petitioner appealed his conviction to the California Court of Appeal, which affirmed his conviction on October 17, 2013. (Petition at 2-3.) Petitioner then sought review by the California Supreme Court, which denied review on January 15, 2014. (Petition at 3.) Petitioner did not file a habeas petition in any state court with respect to the conviction. (Petition at 3.)

On April 10, 2015 Petitioner filed a habeas petition in this Court raising two grounds of insufficiency of evidence in case number 2:15-cv-02691-JGB-KS (“Prior Federal Action”). (Petition at 7.) That petition was dismissed with prejudice on the merits on December 23, 2015. (Doc. Nos. 24, 26, 27, 28 in docket for case number 2:15-cv-02691-JGB-KS.)

On January 12, 2016, Petitioner filed a notice of appeal in the United States Court of Appeals for the Ninth Circuit. (Doc. No. 30 in docket for case number 2:15-cv-02691-JGB-KS.) On August 23, 2016, the Ninth Circuit denied a certificate of appealability because Petitioner had “not made a ‘substantial showing of the denial of a constitutional right.’ 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).” (Doc. No. 34 in Case No. 2:15-cv-02691-JGB-KS.)

The instant Petition, filed on July 10, 2017, contains the same two claims raised in the Prior Federal Action, *i.e.* two grounds of insufficiency of evidence, and a conclusory third ground premised on “Senate Bill 1058.” (Petition at 5-6.)

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Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254 (“Habeas Rules”), requires the Court to dismiss a petition without ordering a responsive pleading where “it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief.” The Court has identified a defect in the Petition that suggests it must be dismissed.

The Instant Petition is An Improper Second and Successive Filing.

The Petition, like the Prior Federal Action, concerns Petitioner’s 2013 conviction. State habeas petitioners generally may file only one federal habeas petition challenging a particular state conviction and/or sentence. *See, e.g.*, 28 U.S.C. § 2244(b)(1) (courts must dismiss a claim presented in a second or successive petition when that claim was presented in a prior petition) and § 2244(b)(2) (with several exceptions not applicable here, courts must dismiss a claim presented in a second or successive petition when that claim was not presented in a prior petition). “A habeas petition is second or successive . . . if it raises claims that were or could have been adjudicated on the merits” in an earlier Section 2254 petition. *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009); *see also Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015) (claims for which the factual predicate existed at the time of the first habeas petition qualify as second or successive) (citations omitted).

Even when Section 2244(b) provides a basis for pursuing a second or successive Section 2254 habeas petition, state habeas petitioners seeking relief in this district court must first obtain authorization from the Ninth Circuit before filing any such second or successive petition. 28 U.S.C. § 2244(b)(3). The Ninth Circuit “may authorize the filing of the second or successive [petition] only if it presents a claim not previously raised that satisfies one of the two grounds articulated in § 2242(b)(2).” *Burton v. Stewart*, 549 U.S. 147, 153 (2007).

In the Prior Federal Action, Petitioner sought Section 2254 relief based on the same state conviction at issue here. As noted, this Court denied the petition in the Prior Federal Action on December 23, 2015 and dismissed the action with prejudice. Therefore, in order for this Court to consider a second or successive 28 U.S.C. § 2254 petition, the Ninth Circuit must first issue authorization to consider that petition. 28 U.S.C. § 2244(b)(3). Here, the Ninth Circuit’s dockets show that Petitioner has not filed any application seeking leave to raise the claims contained in the Petition in a second or successive Section 2254 petition. Accordingly, the Petition is barred

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as second or successive within the meaning of Section 2244(b). *See McNabb*, 576 F.3d at 1030 (holding “that dismissal of a section 2254 habeas petition for failure to comply with the statute of limitations renders subsequent petitions second or successive for purposes of the AEDPA, 28 U.S.C. § 2244(b).”).

Therefore, **Petitioner is ORDERED TO SHOW CAUSE within thirty days of this Order why the Petition should not be dismissed** as second or successive. *See* 28 U.S.C. § 2244(b)(2); *see also Burton*, 549 U.S. at 157 (district court lacks jurisdiction to consider the merits of a second or successive petition absent prior authorization from the circuit court).

To discharge the Order to Show Cause, Petitioner must file, no later than thirty days from this Order: (1) a First Amended Petition For Writ Of Habeas Corpus that explains why his Petition is not second and successive, or (2) authorization from the Ninth Circuit to file a second and successive petition.

Petitioner’s failure to timely show cause for proceeding with this action will result in the Court recommending dismissal pursuant to Rule 4 of the Habeas Rules, Local Rule 41-1, and Rule 41 of the Federal Rules of Civil Procedure.

If Petitioner no longer wishes to pursue this action, he may voluntarily dismiss it by filing a signed document entitled “Notice Of Voluntary Dismissal” in accordance with Federal Rule of Civil Procedure 41(a)(1).

Initials of Preparer

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