UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 2: 17-cv-05261-VBF (KS): Date: July 24, 2017

Title *Timothy Booten v. R.J. Rackley*

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

Roxanne Horan-Walker	N/A
Deputy Clerk	Court Reporter / Recorder

Attorneys Present for Plaintiffs: Attorneys Present for Defendants:

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

On July 17, 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 November 19, 2010 of possession of marijuana with a gang enhancement. (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 December 15, 2013. (Petition at 3.) Petitioner then sought review by the California Supreme Court, which denied review on January 21, 2017. (Petition at 4.)

On September 29, 2014, Petitioner filed a habeas petition in this Court in case number 2:14-cv-7707 VBF-KS ("Prior Federal Action"). (Petition at 7.) In the Prior Federal Action, Petitioner raised five grounds for relief: (1) the conviction for possession of marijuana was the product of an unlawful search warrant, lacking in probable cause; (2) insufficient evidence to support his conviction for possession of marijuana for purpose of sales; (3) the "Superior Court and Court of Appeal orders are superficial, illogical and contrary to the facts and the law of the case;" (4) insufficient evidence supported the gang enhancement; and (5) ineffective assistance of trial counsel. That petition was dismissed with prejudice on the merits on August 24, 2016. (Doc. Nos. 43, 44, 45, 49, 50 in docket for case number 2:14-cv-7707-KS.)

On September 9, 2016, Petitioner filed a notice of appeal in the United States Court of Appeals for the Ninth Circuit. (Doc. No. 52 in docket for case no. 2:14-cv-7707 VBF-KS.) On March 8, 2017, 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. 56 in case no. 2:14-cv-7707 VBF-KS.)

The instant Petition, filed on July 17, 2017, contains five claims: (1) Violation of Fourteenth Amendment right under Cal. Penal Code § 1473 (B)(3)(A) "is a newly enact of law for considering the disqualification of Proposition 64 by using the stigma of gang as a disqualifying factor, without proof of violence or a disqualification factor;" (2) "the phrase any serious and violent felony offense punishable in California by life imprisonment or death (penal Code section 667 (E)(2)(C)(IV)(VIII) refers only to offense [sic] that are listed as serious felonies under section 1192.7 subd. (C) and or violent felonies under section 667.5 subd. (C) and for which the usual prescribed punishment is a life sentence such as kidnapping in violation of penal code section 209;" (3) "substantial due process procedural right as cited under the Fourteenth Amendment is required conduct credit must be awarded from the time of conviction base [sic] on retroactivity constitutional law provision;" (4) "under the Fourteenth Amendment substantial due process procedural requires Petitioner request remand under Penal Code section 1385 for judges exercise discretion to the disqualification reviewing under Proposition 64;" and (5) "as cited under the Fourteenth Amendment in it was abuse of discretion to makes penal code section 186.22 a disqualification factor for suitability under proposition 64." (Petition at 4, and Attachment at 3, 8, 11, 13, 19 (errors in original).)

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 Appears to Be An Improper Second and Successive Filing.

The Petition, like the Prior Federal Action, concerns Petitioner's 2010 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 and dismissed the action with prejudice. The instant Petition appears to challenge the trial court's imposition of a 9 year prison term based on Penal Code section 186.22 (penalty for participation in criminal street gang). (Pet., Attachment at 2.) Petitioner argues that the trial court erred when it used [Penal code section 186.22] to disqualify timothy Booten from modification of sentence without proven a criminal conduct of violent, violence committed against a person or seriousness." (*Id.* (errors in original).) The Petition contends that the trial court's actions violated his right to due process under the Fourteenth Amendment and that he is entitled to relief based on "newly enacted" California Penal Code section 1473 (b)(3)(A), which, he argues, "prohibited the exclusion of application by using illegal disqualification factors under PC § 186.22." (Pet. at 6.) But on examination of Petitioner's arguments in the Attachment submitted with the Petitioner, it appears that Petitioner is, in essence, rearguing the sufficiency of the evidence presented at the trial in support of the gang-enhancement.

Further, while Petitioner is correct that section 1473 (b)(3)(A) was amended effective January 1, 2017, the amendment Petitioner cites provides for a change in the definition of "new evidence," to include evidence "discovered after trial, that would not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching." Cal. Penal C. § 1473 (amended effective Jan.1, 2017).

It is unclear why this amendment to the California Penal Code provides a basis for new federal habeas petition seeking modification of Petitioner's original sentence.[1]

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 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.

---

[1] To the extent that Petitioner contends that the November 2016 enactment of California Proposition 64, the California Marijuna Legalization Initiative, applies retroactively to require a modification of his 2010 sentence for possession of marijuana, that issue raises strictly questions of state law and, therefore, is not cognizable as a federal habeas claim. *See Estelle v McGuire*, 502 U.S. 62, 67 (1991) ("federal habeas corpus relief does not lie for errors of state law") (internal citations omitted). Moreoever, the California Court of Appeal has held that persons sentenced for possession of marijuana for sale prior to the enactment of Proposition 64 are not automatically entitled to a reduction of punishment, but "retroactive application of the lesser punishment [is] contingent on a court's evaluation of the defendant's dangerousness." *See People v. Rascon*, 10 Cal. App.5th 388, 390 (2017) (citing *People v. Conley*, 64 Cal.4th. 646, 653 (2016)).

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 rh