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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH NICHOLS,
Petitioner,
v.
ERIC ARNOLD (Warden),
Respondent.

) Case No. CV 17-8490 DSF(JC)
)
) ORDER DISMISSING PETITION
) FOR WRIT OF HABEAS
) CORPUS AND ACTION
) WITHOUT PREJUDICE
)
)
)

I. SUMMARY

On November 21, 2017, petitioner Joseph Nichols, a California prisoner who is proceeding *pro se*, formally filed a Petition for Writ of Habeas Corpus (“Current Federal Petition”). The Current Federal Petition challenges petitioner’s 1993 conviction and sentence in Los Angeles County Superior Court Case No. PA007472 (“State Case”).

Based on the record (including facts as to which this Court takes judicial notice as detailed below) and the applicable law, the Current Federal Petition and this action are dismissed without prejudice for lack of jurisdiction because petitioner did not obtain the requisite authorization from the Court of Appeals to file a successive petition. Further, the Clerk of the Court is directed to refer the

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1 Current Federal Petition to the United States Court of Appeals for the Ninth Circuit
2 (“Ninth Circuit”) pursuant to Ninth Circuit Rule 22-3(a).¹

3 **II. PROCEDURAL HISTORY**²

4 **A. State Proceedings**

5 On July 8, 1993, a Los Angeles County Superior Court jury convicted
6 petitioner of kidnapping for robbery, second degree robbery, dissuading a witness
7 by force or threat, and evading an officer. The jury also found true allegations that
8 petitioner personally used a firearm in the commission of the foregoing crimes.

9 On direct appeal, the California Court of Appeal struck a personal firearm
10 use enhancement and a prior conviction enhancement, but affirmed the judgment in
11 all other respects. The California Supreme Court denied review on February 1,
12 1995.

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14 ¹Ninth Circuit Rule 22-3(a) provides in pertinent part: “Any petitioner seeking
15 authorization to file a second or successive 2254 petition . . . in the district court must file an
16 application in the Court of Appeals demonstrating entitlement to such leave under 28 U.S.C.
17 § 2254 If a second or successive petition . . . is mistakenly submitted to the district court,
the district court shall refer it to the [C]ourt of [A]ppeals.”

18 ²The facts and procedural history set forth in this section are derived from the Current
19 Federal Petition and supporting documents and dockets/court records in the following Central
20 District of California (“CDCA”) and Ninth Circuit cases of which this Court takes judicial
21 notice: (1) Nichols v. Small, CDCA Case No. 99-10778 LGB(SH) (“First Federal Action”);
22 (2) Nichols v. Evans, CDCA Case No. 06-3278 DSF(SH) (“Second Federal Action”); (3)
23 Nichols v. Evans, CDCA Case No. 06-4168 DSF(SH) (“Third Federal Action”); (4) Nichols v.
24 Evans, CDCA Case No. 06-4481 DSF(SH) (“Fourth Federal Action”); (5) Nichols v. Hedgpeth,
25 CDCA Case No. 09-5418 DSF(SH) (“Fifth Federal Action”); (6) Nichols v. Hedgpeth, CDCA
26 Case No. 11-10181 DSF(SH) (“Sixth Federal Action”); (7) Nichols v. Soto, CDCA Case No. 14-
27 6345 DSF(SH) (“Seventh Federal Action”); (8) Nichols v. Asuncion, CDCA Case No. 16-5405
28 DSF(JC) (“Eighth Federal Action”); (9) Nichols v. Small, et al, Ninth Circuit Case No. 00-56241
 (“First Ninth Circuit Action”); (10) Nichols v. Evans, Ninth Circuit Case No. 06-56075 (“Second
Ninth Circuit Action”); (11) Nichols v. Hedgpeth, Ninth Circuit Case No. 10-55412 (“Third
Ninth Circuit Action”); (12) Nichols v. Hedgpeth, Ninth Circuit Case No. 11-56735 (“Fourth
Ninth Circuit Action”); and (13) Nichols v. Asuncion, Ninth Circuit Case No. 16-72582 (“Fifth
Ninth Circuit Action”). See Fed. R. Evid. 201; Harris v. County of Orange, 682 F.3d 1126,
1131-32 (9th Cir. 2012) (court may take judicial notice of undisputed matters of public record
including documents on file in federal or state courts).

1 Petitioner thereafter sought, and was denied state habeas relief in the Los
2 Angeles County Superior Court, the California Court of Appeal, and the California
3 Supreme Court.

4 **B. First Federal Action and First Ninth Circuit Action**

5 On November 15, 1999, petitioner formally filed the operative first amended
6 petition for writ of habeas corpus (“First Federal Petition”) in the First Federal
7 Action, challenging the judgment in the State Case. On June 23, 2000, the
8 assigned Magistrate Judge issued a Final Report and Recommendation of United
9 States Magistrate Judge, recommending that the First Federal Action be dismissed
10 with prejudice because the First Federal Petition was time-barred. On June 23,
11 2000, the assigned District Judge issued an Order Adopting Final Report and
12 Recommendation of United States Magistrate Judge and dismissed the First
13 Federal Petition with prejudice. On June 27, 2000, judgment was entered
14 accordingly.

15 On July 6, 2000, petitioner filed a notice of appeal. On December 28, 2000,
16 in the First Ninth Circuit Action, the Ninth Circuit denied petitioner’s request for a
17 certificate of appealability.

18 **C. Second Federal Action and Second Ninth Circuit Action**

19 On May 26, 2006, petitioner filed a petition for writ of habeas corpus
20 (“Second Federal Petition”) in the Second Federal Action, again challenging the
21 judgment in the State Case. On May 31, 2006, this Court summarily dismissed the
22 Second State Petition without prejudice as successive. On July 3, 2006, this Court
23 denied petitioner’s motion to vacate judgment.

24 On August 1, 2006, after being afforded an extension of time, petitioner filed
25 a Notice of Appeal. On March 27, 2007, in the Second Ninth Circuit Action, the
26 Ninth Circuit denied petitioner’s request for a certificate of appealability.

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1 **D. Third Federal Action**

2 On June 30, 2006, petitioner filed a petition for writ of habeas corpus
3 (“Third Federal Petition”) in the Third Federal Action, again challenging the
4 judgment in the State Case. On July 6, 2006, this Court summarily dismissed the
5 Third Federal Petition without prejudice as successive. Petitioner did not appeal.

6 **E. Fourth Federal Action**

7 On July 18, 2006, petitioner filed a petition for writ of habeas corpus
8 (“Fourth Federal Petition”) in the Fourth Federal Action, again challenging the
9 judgment in the State Case. On July 20, 2006, this Court summarily dismissed the
10 Fourth Federal Petition without prejudice as successive. Petitioner did not appeal.

11 **F. Fifth Federal Action, Third Ninth Circuit Action, and Fourth
12 Ninth Circuit Action**

13 On July 24, 2009, petitioner filed a petition for writ of habeas corpus (“Fifth
14 Federal Petition”) in the Fifth Federal Action, again challenging the judgment in
15 the State Case. On August 11, 2009, this Court summarily dismissed the Fifth
16 Federal Petition without prejudice as successive. On September 17, 2009,
17 petitioner filed a Notice of Appeal, appealing such dismissal.

18 On February 11, 2010, this Court denied petitioner’s motion to vacate
19 judgment. On March 12, 2010, petitioner filed another Notice of Appeal,
20 appealing such denial.

21 On October 24, 2011, in the Third and Fourth Ninth Circuit Actions, the
22 Ninth Circuit denied petitioner’s requests for certificates of appealability.

23 **G. Sixth Federal Action**

24 On December 8, 2011, petitioner filed a petition for writ of habeas corpus
25 (“Sixth Federal Petition”) in the Sixth Federal Action, again challenging the
26 judgment in the State Case. On December 27, 2011, this Court summarily
27 dismissed the Sixth Federal Petition without prejudice as successive. Petitioner did
28 not appeal.

1 **H. Seventh Federal Action**

2 On August 13, 2014, petitioner filed a petition for writ of habeas corpus
3 (“Seventh Federal Petition”) in the Seventh Federal Action, again challenging the
4 judgment in the State Case. On August 15, 2014, this Court summarily dismissed
5 the Seventh Federal Petition without prejudice as successive. On September 11,
6 2014, this Court denied petitioner’s motion to vacate judgment. Petitioner did not
7 appeal.

8 **I. Eighth Federal Petition and Fifth Ninth Circuit Action**

9 On July 20, 2016, petitioner filed a petition for writ of habeas corpus
10 (“Eighth Federal Petition”) in the Eighth Federal Action, again challenging the
11 judgment in the State Case. On August 1, 2016, this Court summarily dismissed
12 the Eighth Federal Petition without prejudice as successive and directed the Clerk
13 to refer the matter to the Ninth Circuit pursuant to Ninth Circuit Rule 22-3(a). See
14 supra note 1. Judgment was entered accordingly on August 2, 2016. Petitioner did
15 not appeal.

16 On February 15, 2017, in the Fifth Ninth Circuit Action, the Ninth Circuit
17 denied petitioner leave to file a second or successive 28 U.S.C. § 2254 habeas
18 corpus petition.

19 **J. Current Federal Petition**

20 As noted above, on November 21, 2017, petitioner formally filed the Current
21 Federal Petition which again challenges the judgment in the State Case. The
22 record does not reflect that petitioner has obtained authorization from the Ninth
23 Circuit to file the Current Federal Petition in District Court.³

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27 ³A search of the court’s PACER system does not reflect that petitioner has been granted
28 leave to file a second or successive petition by the Ninth Circuit.

1 **III. DISCUSSION**

2 Before a habeas petitioner may file a second or successive petition in a
3 district court, he must apply to the appropriate court of appeals for an order
4 authorizing the district court to consider the application. Burton v. Stewart, 549
5 U.S. 147, 152-53 (2007) (citing 28 U.S.C. § 2244(b)(3)(A)). This provision
6 “creates a ‘gatekeeping’ mechanism for the consideration of second or successive
7 applications in district court.” Felker v. Turpin, 518 U.S. 651, 657 (1996); see also
8 Reyes v. Vaughn, 276 F.Supp.2d 1027, 1028-30 (C.D. Cal. 2003) (discussing
9 applicable procedures in Ninth Circuit). A district court lacks jurisdiction to
10 consider the merits of a second or successive habeas petition in the absence of
11 proper authorization from a court of appeals. Cooper v. Calderon, 274 F.3d 1270,
12 1274 (9th Cir. 2001) (per curiam) (citing United States v. Allen, 157 F.3d 661, 664
13 (9th Cir. 1998)), cert. denied, 538 U.S. 984 (2003).

14 A second or subsequent habeas petition is not considered “successive” if the
15 initial habeas petition was dismissed for a technical or procedural reason, rather
16 than on the merits. See Slack v. McDaniel, 529 U.S. 473, 485-487 (2000) (second
17 habeas petition not “successive” if initial habeas petition dismissed for failure to
18 exhaust state remedies); Stewart v. Martinez-Villareal, 523 U.S. 637, 643-645
19 (1998) (second habeas petition not “successive” if claim raised in first habeas
20 petition dismissed as premature); but see McNabb v. Yates, 576 F.3d 1028, 1030
21 (9th Cir. 2009) (dismissal on statute of limitations grounds constitutes disposition
22 on the merits rendering subsequent petition “second or successive”); Henderson v.
23 Lampert, 396 F.3d 1049, 1053 (9th Cir.) (dismissal on procedural default grounds
24 constitutes disposition on the merits rendering subsequent petition “second or
25 successive”), cert. denied, 546 U.S. 884 (2005); Plaut v. Spendthrift Farm, Inc.,
26 514 U.S. 211, 228 (1995) (dismissal for failure to prosecute treated as judgment on
27 the merits) (citations omitted); Reyes v. United States, 1999 WL 1021815 *3
28 (E.D.N.Y. 1999) (dismissal of first habeas petition for failure to prosecute pursuant

1 to Fed. R. Civ. P. 41(b) constitutes dismissal on the merits and renders
2 subsequently filed habeas petition second or successive).

3 Petitioner's First Federal Petition was dismissed with prejudice as untimely
4 – a determination which the Ninth Circuit has deemed to constitute a disposition on
5 the merits. See McNabb, 576 F.3d at 1030. Accordingly, the Current Federal
6 Petition – like the Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Federal
7 Petitions – is successive. Since petitioner filed the Current Federal Petition
8 without authorization from the Ninth Circuit, this Court lacks jurisdiction to
9 consider it.

10 **IV. ORDER**

11 IT IS THEREFORE ORDERED that the Current Federal Petition and this
12 action are dismissed without prejudice. The Clerk of the Court is directed to refer
13 the Current Federal Petition to the Ninth Circuit pursuant to Ninth Circuit Rule 22-
14 3(a).

15 IT IS SO ORDERED.

16 12/4/17

17 DATED: _____



18 HONORABLE DALE S. FISCHER
19 UNITED STATES DISTRICT JUDGE
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