

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

STEVEN JOHN PEREZ,
Petitioner,
v.
SULLIVAN, Warden,
Respondent.

No. CV 18-303-DSF (PLA)
**ORDER SUMMARILY DISMISSING
HABEAS PETITION AS SUCCESSIVE**

**I.
BACKGROUND**

Steven John Perez (“petitioner”) initiated this action on January 12, 2018, by filing a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (“2018 Petition” or “2018 Pet.”). The 2018 Petition challenges his April 2, 2002, conviction in the Los Angeles County Superior Court, case number KA055846, for criminal threats (Cal. Penal Code § 422), and possession of a firearm (former Cal. Penal Code § 12021(a)). (2018 Pet. at 2).

The Court observes that on June 17, 2004, petitioner filed an earlier habeas petition in this Court, in case number CV 04-4363-DSF (PLA) (“CV 04-4363”), which also challenged his 2002 conviction (“2004 Petition”). The 2004 Petition was dismissed on the merits with prejudice

1 pursuant to the Judgment entered on December 12, 2005. (Case No. CV 04-4363, ECF No. 32).
2 Petitioner did not appeal that decision.

3 On October 22, 2014, petitioner filed another habeas petition in this Court, in case number
4 CV 14-8168-DSF (PLA) ("CV 14-8168"), also challenging his 2002 conviction ("2014 Petition").
5 On November 24, 2014, the Magistrate Judge issued an order requiring petitioner to show cause
6 why the 2014 Petition should not be dismissed as successive. (Case No. CV 14-8168, ECF No.
7 8). When petitioner failed to file a response to the order to show cause, the Magistrate Judge
8 issued a Report and Recommendation recommending that the 2014 Petition be dismissed as
9 successive. (Case No. CV 14-8168, ECF No. 17). On March 9, 2015, petitioner filed a number
10 of documents, including one in which he declined to object to the Report and Recommendation
11 (Case No. CV 14-8168, ECF No. 21), and another confirming that he was seeking to withdraw the
12 2014 Petition (Case No. CV 14-8168, ECF No. 22), which together the Court construed as a notice
13 of voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1). (Case No. CV 14-
14 8168, ECF No. 25). In related documents filed at the same time, petitioner acknowledged that the
15 2014 Petition was successive. (See, e.g., Case No. CV 14-8168, ECF Nos. 23, 24). On March
16 16, 2015, the Court granted petitioner's request for voluntary dismissal and the action was
17 terminated. (Id.).

18
19 **II.**

20 **DISCUSSION**

21 A federal habeas petition is successive if it raises claims that were or could have been
22 adjudicated on the merits in a previous petition. Cooper v. Calderon, 274 F.3d 1270, 1273 (9th
23 Cir. 2001) (per curiam). The AEDPA provides that a claim presented in a second or successive
24 federal habeas petition that was not presented in a prior petition shall be dismissed unless:

25 (A) the applicant shows that the claim relies on a new rule of constitutional law,
26 made retroactive to cases on collateral review by the Supreme Court, that was
27 previously unavailable; or
28

1 (B)(i) the factual predicate for the claim could not have been discovered previously
2 through the exercise of due diligence; and

3 (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a
4 whole, would be sufficient to establish by clear and convincing evidence that, but for
constitutional error, no reasonable factfinder would have found the applicant guilty
of the underlying offense.

5 28 U.S.C. § 2244(b)(2)(A), (B).

6 Furthermore, “[b]efore a second or successive application permitted by this section is filed
7 in the district court, the applicant shall move in the appropriate court of appeals for an order
8 authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A).

9 In his 2004 Petition, petitioner raised the following grounds for relief: (1) there was
10 insufficient evidence to support his conviction for making criminal threats; (2) the trial court abused
11 its discretion when it refused to strike petitioner’s prior conviction; (3) petitioner was not read his
12 Miranda¹ rights with respect to the criminal threats charge; (4) the prosecution’s witness committed
13 perjury; and (5) trial counsel rendered ineffective assistance. (Case No. 04-4363, ECF No. 29 at
14 6-7). In his 2014 Petition, petitioner raised the following grounds for relief: (1) there was
15 insufficient evidence to support the conviction for making criminal threats; (2) the trial court abused
16 its discretion when it refused to strike petitioner’s prior conviction; (3) a sentencing error claim
17 based on California’s Proposition 36, enacted in 2012; and (4) a sentencing error claim based on
18 finding “two strikes on one case.” (Case No. CV 14-8168, ECF No. 1). As mentioned above, the
19 2004 action was dismissed on the merits, and the 2014 action was voluntarily dismissed by
20 petitioner as successive. In the 2018 Petition, petitioner appears to be asserting that his sentence
21 is illegal; that his sentence constitutes cruel and unusual punishment; and that the affirmative
22 defense of “flight or fight” should have been asserted by trial counsel. (2018 Pet.). It also appears
23 that petitioner raised these claims in recent habeas petitions to the state courts, including to the
24 California Supreme Court. (2018 Pet. Ex. A). The California Supreme Court denied petitioner’s
25 habeas petition on November 15, 2017. (Id.).

26
27 ¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

1 Petitioner does not contend that his claims rely on a new rule of constitutional law, made
2 retroactive to cases on collateral review by the United States Supreme Court, that was previously
3 unavailable; and, it appears to the Court that even if petitioner is seeking to present new claims in
4 the 2018 Petition, the factual predicate for those claims could have previously been discovered
5 through the exercise of due diligence. Thus, the 2018 Petition is successive. However, even if the
6 instant claims satisfied the exceptions found in 28 U.S.C. § 2244(b)(2)(A) or § 2244(b)(2)(B) (and it
7 does not appear that petitioner has satisfied any of those provisions), petitioner is **nevertheless**
8 **required to seek and receive authorization from the Ninth Circuit before filing a successive**
9 **petition.** 28 U.S.C. § 2244(b)(3)(A); see Burton v. Stewart, 549 U.S. 147, 153, 127 S. Ct. 793, 166
10 L. Ed. 2d 628 (2007) (AEDPA requires petitioner to receive authorization from the Court of Appeals
11 before filing a second habeas petition). There is no indication that petitioner has obtained such
12 permission from the Ninth Circuit.²

13 Therefore, the Court is without jurisdiction to entertain the 2018 Petition under 28 U.S.C. §
14 2244(b). See Burton, 549 U.S. at 153; Cooper, 274 F.3d at 1274 (“When the AEDPA is in play, the
15 district court may not, in the absence of proper authorization from the court of appeals, consider a
16 second or successive habeas application.”).

17 Accordingly, dismissal of the 2018 Petition as successive is appropriate.³

18 _____
19 ² In the event that petitioner has not complied with 28 U.S.C. § 2244(b)(3)(A), he is advised
20 that if he wishes to make a successive habeas application, he must file a “Motion for Order
21 Authorizing District Court to Consider Second or Successive Petition Pursuant to 28 U.S.C. §
22 2244(b)(3)(A)” **directly with the Ninth Circuit.** Until the Ninth Circuit issues such an order, any
23 direct or implied request for a second or successive petition for writ of habeas corpus is barred by
24 § 2244(b) and must be dismissed **without prejudice** to petitioner’s right to seek authorization from
25 the Ninth Circuit to file the petition. If petitioner *obtains* permission from the Ninth Circuit Court
of Appeals to file a successive petition, he should file a new petition for writ of habeas corpus. He
should not file an amended petition in this action or use the case number from this action because
the instant action is being closed today. If petitioner files a new *authorized* petition, the Court will
give that petition a new case number.

26 ³ The 2018 Petition is subject to the AEDPA’s one-year statute of limitations period, as set
27 forth under 28 U.S.C. § 2244(d). See Calderon v. U.S. Dist. Ct. (Beeler), 128 F.3d 1283, 1286
28 (9th Cir. 1997), overruled on other grounds by Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530, 540
(9th Cir. 1998) (en banc). In most cases, the limitation period begins to run from “the date on

(continued...)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III.

CONCLUSION

IT IS THEREFORE ORDERED that this action is **dismissed without prejudice** as successive.



DATED: January 18, 2018

HONORABLE DALE S. FISCHER
UNITED STATES DISTRICT JUDGE

³(...continued)
which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). Petitioner’s petition for review in the California Supreme Court was denied on November 25, 2003. (Official Rec. of Cal. Cts.). Thus, his conviction became final on February 25, 2004, when the ninety-day period for filing a petition for certiorari in the Supreme Court expired. Petitioner filed the 2018 Petition on January 12, 2018, more than sixteen years after his conviction. (ECF No. 1). On its face, therefore, it appears that the 2018 Petition is also barred by the statute of limitations.