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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DOMINIQUE MERRIMAN,
Petitioner,
v.
MICHAEL MARTEL, Warden,
Respondent.¹

NO. CV 19-5757-AB (AGR)

OPINION AND ORDER ON
SECOND OR SUCCESSIVE
PETITION

Because Petitioner previously challenged the same underlying state-court judgment in a prior habeas action that the Court dismissed with prejudice, and because Petitioner lacks Ninth Circuit authorization to file a second or successive habeas petition, the Court lacks jurisdiction over the Petition for Writ of Habeas Corpus.

¹ Petitioner listed “State of California” as the Respondent. Petitioner is currently incarcerated at the California Health Care Facility (“CHCF”) in Stockton, CA. According to the California Department of Corrections and Rehabilitation (“CDCR”)’s website, Michael Martel has been the Warden at CHCF since August 2016. Pursuant to Fed. R. Civ. P. 25(d), the Court substitutes Michael Martel as the proper Respondent. See *Rumsfield v. Padilla*, 542 U.S. 426, 435 (2004) (proper Respondent is “person who has the immediate custody of the party detained”).

I.

PROCEDURAL HISTORY

Pursuant to Fed. R. Evid. 201, the Court takes judicial notice of the records in Petitioner’s prior federal habeas corpus action in the Central District of California in *Merriman v. Lizarraga*, No. CV 17-8303-AB (AGR) (C.D. Cal. Oct. 16, 2018) (“*Merriman I*”).

On February 14, 2013, Petitioner pled no contest to one count of kidnapping, one count of second degree robbery, admitted that he used a deadly and dangerous weapon in the commission of the offenses, and had suffered a prior serious or violent felony conviction. On December 19, 2013, the court sentenced Petitioner to 24 years in state prison. *People v. Merriman*, No. B254085, 2015 Cal. App. Unpub. LEXIS 83, at *2-5 (Cal. Ct. App. Jan. 6, 2015).

On January 6, 2015, the California Court of Appeal affirmed the judgment in full. *Id.* at *1. Petitioner did not file a petition for review. (*Merriman I*, Dkt. No. 23 at 6.)²

A. State Habeas Petitions

On October 3, 2016, a Los Angeles County Superior Court denied a state habeas petition. (*Merriman I*, Dkt. No. 13-4 at 2-3.) The Superior Court denied a second state habeas petition on April 21, 2017. (*Id.*, Dkt. No. 13-5 at 2.) On June 9, 2017, the Superior Court denied a third state habeas petition. (*Id.*, Dkt. No. 13-7 at 2.)

On October 4, 2017, the California Court of Appeal summarily denied a state habeas petition. (*Id.*, Dkt. No. 13-9 at 2; Case number B285374.) On February 14, 2018, the California Supreme Court summarily denied a state

² Citations are to the page and document numbers generated by the Case Management/Electronic Case Filing (“CM/ECF”) system in the header of the documents.

1 habeas petition. (*Merriman I*, Dkt. No. 13-11; Case number S245803.)

2 On September 5, 2018, the California Court of Appeal summarily denied a
3 state habeas petition. (Case number B292256.)³ On April 24, 2019, the California
4 Supreme Court summarily denied a state habeas petition. (Case number
5 S252733.)⁴

6 **B. Merriman I: CV 17-8303**

7 On November 6, 2017, Petitioner constructively filed a Petition for Writ of
8 Habeas Corpus by a Person in State Custody (“Petition”), pursuant to 28 U.S.C. §
9 2254, before this Court in *Merriman I*. (Dkt. No. 1 at 50 (proof of service).) On
10 August 21, 2018, the magistrate judge issued a Report and Recommendation
11 (“Report”) finding that the Petition was untimely and barred by the statute of
12 limitations and recommended that judgment be entered denying the petition and
13 dismissing the action with prejudice. (*Merriman I*, Dkt. No. 23 at 8-13.)

14 On October 16, 2018, the district court entered an order accepting the
15 Report, entered judgment denying the Petition and dismissing the action with
16 prejudice, and also denied a Certificate of Appealability. (*Id.*, Dkt. Nos. 25-27.)

17 **C. Merriman II: CV 19-5757**

18 On June 19, 2019, Petitioner constructively filed the instant Petition before
19 this Court in *Merriman v. Lizarraga*, No. CV 19-5757 (C.D. Cal. 2019) (“*Merriman*
20 *II*”). (Dkt. No. 1 at 53.) Petitioner again challenges the same state court
21 conviction and sentence that he previously challenged in *Merriman I*. (*Merriman*
22

23 ³ Docket information available on California Appellate Courts website at:
24 https://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=2&doc_id=2261201&doc_no=B292256&request_token=NilwLSIkTkw4WyBRSCJdXE9lIEw6USxTKil%2BTz9SUCAgCg%3D%3D.

26 ⁴ Docket information available on California Appellate Courts website at:
27 https://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=0&doc_id=2271426&doc_no=S252733&request_token=NilwLSIkTkw4WyBRSCJdWE5lIF_A0UDxTJil%2BWzITQCAGCg%3D%3D.

1 //, Dkt. No. 1 at 2, 5-6, 14-28.)

2 The Court takes judicial notice of the Ninth Circuit’s online public records
3 database indicating that Petitioner has not received authorization from the Ninth
4 Circuit to file a second or successive Petition.

5 II.

6 **DISCUSSION**

7 The Petition was filed after enactment of the Antiterrorism and Effective
8 Death Penalty Act of 1996 (“AEDPA”). Therefore, the Court applies the AEDPA
9 in reviewing the Petition. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

10 The AEDPA provides, in pertinent part: “Before a second or successive
11 application permitted by this section is filed in the district court, the applicant shall
12 move in the appropriate court of appeals for an order authorizing the district court
13 to consider the application.” 28 U.S.C. § 2244(b)(3)(A). A district court does not
14 have jurisdiction to consider a “second or successive” Petition absent
15 authorization from the Ninth Circuit. *Burton v. Stewart*, 549 U.S. 147, 152 (2007).

16 The instant Petition is second or successive because Petitioner again
17 challenges the same state court conviction and sentence that he previously
18 challenged in *Merriman I*. In the Petition that he filed in *Merriman I*, Petitioner
19 raised the following three grounds for relief: (1) ineffective assistance of counsel
20 based on failure to accurately represent the evidence and failure to accurately
21 advise Petitioner before entering the no-contest plea; (2) the court failed to
22 conduct a hearing pursuant to *People v. Marsden*, 2 Cal. 3d 118 (1970) on
23 Petitioner’s ineffective assistance of counsel claim; and (3) the court abused its
24 discretion by not allowing Petitioner a reasonable time to prepare for the hearing
25 to withdraw the plea. (*Merriman I*, Dkt. No. 1 at 5-10, 20-27.) On October 16,
26 2018, the district court entered an order accepting the Report, entered judgment
27 denying the Petition and dismissing the action with prejudice, and also denied a
28

1 Certificate of Appealability. (*Id.*, Dkt. Nos. 25-27.)

2 In *Merriman II*, Petitioner again challenges the same underlying conviction
3 and sentence. Petitioner raised the following grounds for relief: (1) the court
4 erroneously determined that Petitioner suffered a prior strike conviction for the
5 sentencing enhancement; (2-3) trial counsel’s ineffective assistance undermined
6 the voluntary and intelligent nature of the plea; and (4) ineffective assistance of
7 counsel on appeal. (*Merriman II*, Dkt. No. 1 at 5-6, 13-28.)

8 A Petition is second or successive “if the facts underlying the claim
9 occurred by the time of the initial petition” and “if the petition challenges the same
10 state court judgment as the initial petition.” *Brown v. Muniz*, 889 F.3d 661, 667
11 (9th Cir. 2018), *cert. denied Brown v. Hatton*, 139 S.Ct. 841 (2019) (citing *Panetti*
12 *v. Quarterman*, 551 U.S. 930, 945 (2007); *Magwood v. Patterson*, 561 U.S. 320,
13 332 (2010)). Thus, the instant Petition is second or successive.

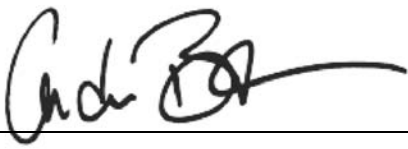
14 A review of the Ninth Circuit’s online database indicates that Petitioner has
15 not received authorization from the Ninth Circuit Court of Appeals to file a second
16 or successive Petition. See *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir.
17 2001) (“When the AEDPA is in play, the district court may not, in the absence of
18 proper authorization from the court of appeals, consider a second or successive
19 habeas application.”) (citation and quotation marks omitted). Rule 4 of the Rules
20 Governing Section 2254 Cases in the United States Courts provides that “[i]f it
21 plainly appears from the face of the petition and any attached exhibits that the
22 petitioner is not entitled to relief in the district court, the judge must dismiss the
23 petition and direct the clerk to notify the petitioner.” The Court therefore
24 dismisses the Petition as a second or successive Petition for which it lacks
25 jurisdiction. The Clerk is directed to send Petitioner a copy of Ninth Circuit Form
26 12 so that he can provide the necessary information to the Ninth Circuit for such
27 an application.

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III.
ORDER

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

DATED: August 13, 2019



ANDRE BIROTTE JR.
United States District Judge