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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 DOMINIQUE MERRIMAN,

12 Petitioner,

13 v.

14 ROBERT BURTON, Acting Warden,

15 Respondent.¹
16
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NO. CV 20-5940-AB (AGR)

OPINION AND ORDER ON
SECOND OR SUCCESSIVE
PETITION

18 Because Petitioner previously challenged the same underlying state-court
19 judgment in a prior habeas action that the Court dismissed with prejudice, and
20 because Petitioner lacks Ninth Circuit authorization to file a second or successive
21 habeas petition, the Court lacks jurisdiction over the Petition for Writ of Habeas
22 Corpus.
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26 ¹ Petitioner listed “State of California” as the Respondent. Petitioner is
27 currently incarcerated at the California Health Care Facility (“CHCF”) in Stockton,
28 CA. According to the California Department of Corrections and Rehabilitation
 (“CDCR”)’s website, Robert Burton is the Acting Warden at CHCF. Pursuant to
 Fed. R. Civ. P. 25(d), the Court substitutes Robert Burton 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 a Petition in *Merriman v.*
19 *Lizarraga*, No. CV 19-5757 (C.D. Cal. 2019) (“*Merriman II*”). (Dkt. No. 1 at 53.)
20 Petitioner again challenged the same state court conviction and sentence that he
21 previously challenged in *Merriman I*. (*Merriman II*, Dkt. No. 1 at 2, 5-6, 14-28.)
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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=NilwLSIkTkw4WyBRSCJdWE5lIFAOUDxTJil%2BWzITQCAgCg%3D%3D.

1 On August 13, 2019, this Court dismissed the Petition as second or
2 successive, entered judgment and denied a certificate of appealability.
3 (*Merriman II*, Dkt. Nos. 5-7.)

4 **D. Application to File Successive Petition in Ninth Circuit**

5 On August 23, 2019, Petitioner filed, in the Ninth Circuit, an application for
6 leave to file a second or successive petition. The Ninth Circuit denied the
7 application. *Merriman v. Martel*, 2019 U.S. App. LEXIS 28635 (9th Cir. Sept. 20,
8 2019).

9 **E. Merriman III**

10 On June 21, 2020, Petitioner constructively filed the Petition for Writ of
11 Habeas Corpus in this case. (Dkt. No. 1.)

12 **II.**

13 **DISCUSSION**

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

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

23 The instant Petition is second or successive because Petitioner again
24 challenges the same state court conviction and sentence that he previously
25 challenged in *Merriman I*. In the Petition that he filed in *Merriman I*, Petitioner
26 raised the following three grounds for relief: (1) ineffective assistance of counsel
27 based on failure to accurately represent the evidence and failure to accurately
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1 advise Petitioner before entering the no-contest plea; (2) the court failed to
2 conduct a hearing pursuant to *People v. Marsden*, 2 Cal. 3d 118 (1970) on
3 Petitioner’s ineffective assistance of counsel claim; and (3) the court abused its
4 discretion by not allowing Petitioner a reasonable time to prepare for the hearing
5 to withdraw the plea. (*Merriman I*, Dkt. No. 1 at 5-10, 20-27.) On October 16,
6 2018, the district court entered an order accepting the Report, entered judgment
7 denying the Petition and dismissing the action with prejudice, and also denied a
8 Certificate of Appealability. (*Id.*, Dkt. Nos. 25-27.)

9 In *Merriman II*, Petitioner again challenged the same underlying conviction
10 and sentence. Petitioner raised the following grounds for relief: (1) the court
11 erroneously determined that Petitioner suffered a prior strike conviction for the
12 sentencing enhancement; (2-3) trial counsel’s ineffective assistance undermined
13 the voluntary and intelligent nature of the plea; and (4) ineffective assistance of
14 counsel on appeal. (*Merriman II*, Dkt. No. 1 at 5-6, 13-28.) This Court denied the
15 Petition as second or successive.

16 On August 23, 2019, Petitioner filed, in the Ninth Circuit, an application to
17 file a second or successive petition. Petitioner challenged the use of a prior
18 conviction to enhance his sentence in the underlying California criminal case.
19 Petitioner contended that the use of his prior robbery conviction based on a plea
20 agreement in Oregon state court was unconstitutional in the California criminal
21 case because his counsel in Oregon failed to inform him that he was pleading to
22 a “priorable offense.” (9th Cir. Case No. 19-72142, Dkt. No. 1, 5.) The Ninth
23 Circuit denied the application for leave to file a second or successive petition.
24 *Merriman v. Martel*, 2019 U.S. App. LEXIS 28635 (9th Cir. Sept. 20, 2019).

25 In *Merriman III*, Petitioner asserts a single ground for relief based on Cal.
26 Penal Code § 1016.8. (Petition, Dkt. No. 1 at 5-6.) Petitioner concedes that §
27 1016.8 “is not, by its plain meaning, retroactive itself, nor is it intended to function
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1 to invalidate a sentence enhancement by a prior conviction where a defendant
2 was not advised of future adverse consequences.” (*Id.* at 6.) Indeed, it does not
3 appear that § 1016.8 has any application to Petitioner’s case.⁵

4 A Petition is second or successive “if the facts underlying the claim
5 occurred by the time of the initial petition” and “if the petition challenges the same
6 state court judgment as the initial petition.” *Brown v. Muniz*, 889 F.3d 661, 667
7 (9th Cir. 2018), *cert. denied Brown v. Hatton*, 139 S.Ct. 841 (2019) (citing *Panetti*
8 *v. Quarterman*, 551 U.S. 930, 945 (2007); *Magwood v. Patterson*, 561 U.S. 320,
9 332 (2010)). Thus, the instant Petition is second or successive.

10 A review of the Ninth Circuit’s online database indicates that Petitioner has
11 not received authorization from the Ninth Circuit Court of Appeals to file a second
12 or successive Petition. See *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir.
13 2001) (“When the AEDPA is in play, the district court may not, in the absence of
14 proper authorization from the court of appeals, consider a second or successive
15 habeas application.”) (citation and quotation marks omitted).

16 Rule 4 of the Rules Governing Section 2254 Cases in the United States
17 Courts provides that “[i]f it plainly appears from the face of the petition and any
18 attached exhibits that the petitioner is not entitled to relief in the district court, the
19 judge must dismiss the petition and direct the clerk to notify the petitioner.” The
20 Court therefore dismisses the Petition as a second or successive Petition for
21 which it lacks jurisdiction. The Clerk is directed to send Petitioner a copy of Ninth
22 Circuit Form 12 so that he can provide the necessary information to the Ninth
23 Circuit for such an application.

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25 ⁵ Section 1016.8 provides, in relevant part: “A provision of a plea bargain
26 that requires a defendant to generally waive future benefits of legislative
27 enactments, initiatives, appellate decisions, or other changes in the law that may
28 retroactively apply after the date of the plea is void as against public policy.” Cal.
Penal Code § 1016.8(b). Petitioner does not identify any such waiver in the plea
agreement in the Oregon state case or the California state case.

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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: September 22, 2020

ANDRE BIROTTE JR.
United States District Judge