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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CARLOS HERRERA,)	1:11-cv-00521-AWI-BAM-HC
)	
Petitioner,	)	FINDINGS AND RECOMMENDATIONS TO
	)	GRANT RESPONDENT'S MOTION TO
v.	)	DISMISS THE FIRST AMENDED
	)	PETITION (Docs. 23, 14)
)	
WARDEN CASH,	)	FINDINGS AND RECOMMENDATIONS TO
	)	DISMISS THE FIRST AMENDED
Respondent.	)	PETITION FOR LACK OF SUBJECT
	)	MATTER JURISDICTION (Doc. 14),
	)	DECLINE TO ISSUE A CERTIFICATE OF
	)	APPEALABILITY, AND DIRECT THE
	)	CLERK TO CLOSE THE CASE

OBJECTIONS DEADLINE:
THIRTY (30) DAYS

Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304. Pending before the Court is the Respondent's motion to dismiss the first amended petition (FAP) as successive and untimely. The motion was filed on October 25, 2011, with supporting documentation. Petitioner filed opposition on November 9, 2011, and Respondent filed a reply with additional documentation on November 29, 2011.

1 I. Proceeding by a Motion to Dismiss

2 Respondent has filed a motion to dismiss the petition on the
3 grounds that the petition is successive and that Petitioner filed
4 his petition outside of the one-year limitation period provided
5 for by 28 U.S.C. § 2244(d) (1).

6 Rule 4 of the Rules Governing Section 2254 Cases in the
7 United States District Courts (Habeas Rules) allows a district
8 court to dismiss a petition if it "plainly appears from the face
9 of the petition and any exhibits annexed to it that the
10 petitioner is not entitled to relief in the district court...."

11 The Ninth Circuit has allowed respondents to file motions to
12 dismiss pursuant to Rule 4 instead of answers if the motion to
13 dismiss attacks the pleadings by claiming that the petitioner has
14 failed to exhaust state remedies or has violated the state's
15 procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418,
16 420 (9th Cir. 1990) (using Rule 4 to evaluate a motion to dismiss
17 a petition for failure to exhaust state remedies); White v.
18 Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 to
19 review a motion to dismiss for state procedural default); Hillery
20 v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D.Cal. 1982) (same).
21 Thus, a respondent may file a motion to dismiss after the Court
22 orders the respondent to respond, and the Court should use Rule 4
23 standards to review a motion to dismiss filed before a formal
24 answer. See, Hillery, 533 F. Supp. at 1194 & n.12.

25 Further, a federal court is a court of limited jurisdiction
26 which has a continuing duty to determine its own subject matter
27 jurisdiction and to dismiss an action where it appears that the
28 Court lacks jurisdiction. Fed. R. Civ. P. 12(h) (3); CSIBI v.

1 Fustos, 670 F.2d 134, 136 n.3 (9th Cir. 1982) (citing City of
2 Kenosha v. Bruno, 412 U.S. 507, 511-512 (1973)); Billingsley v.
3 C.I.R., 868 F.2d 1081, 1085 (9th Cir. 1989).

4 In this case, Respondent's motion to dismiss addresses the
5 untimeliness of the petition pursuant to 28 U.S.C. 2244(d)(1).
6 It also addresses whether the petition is successive, a
7 circumstance that would deprive the Court of subject matter
8 jurisdiction over the petition. The material facts pertinent to
9 the motion are mainly to be found in copies of the official
10 records of state and federal judicial proceedings which have been
11 provided by Respondent and Petitioner, and as to which there is
12 no factual dispute. Because Respondent has not filed a formal
13 answer, and because Respondent's motion to dismiss is similar in
14 procedural standing to a motion to dismiss for failure to exhaust
15 state remedies or for state procedural default, the Court will
16 review Respondent's motion to dismiss pursuant to its authority
17 under Rule 4.

18 II. Background

19 In the first amended petition presently pending before the
20 Court, Petitioner challenges his 1995 conviction of possession of
21 a sharp instrument while in prison in violation of Cal. Pen. Code
22 § 4502 on the grounds of the ineffective assistance of counsel
23 and the state's failure to disclose favorable evidence. (Doc.
24 14, 1-21.)

25 The Court takes judicial notice of the docket of this Court
26 in Carlos Herrera v. Roy A. Castro, case number 1:99-cv-05591-SMS
27 or CV F 99 5591 SMS P, which reflects that Petitioner filed a
28 previous petition for writ of habeas corpus in this Court on

1 April 28, 1999.¹ (Doc. 1.) In the petition, Petitioner
2 challenged his 1995 conviction of possession of a sharp
3 instrument while confined in prison in violation of Cal. Pen.
4 Code § 4502 on the grounds of ineffective assistance of counsel,
5 vagueness of the statute defining the offense, and sentencing
6 error. (Ord. granting mot. to dismiss, doc. 28, 1-2.) On June
7 9, 2000, the petition was dismissed on the Respondent's motion on
8 the ground that the petition was untimely because filed beyond
9 the statutory limitations period. (Id. at 4-10.) Judgment for
10 the Respondent was entered on June 14, 2000. (Doc. 29.)

11 III. Dismissal of the Petition as Successive

12 Because the petition was filed after April 24, 1996, the
13 effective date of the Antiterrorism and Effective Death Penalty
14 Act of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh
15 v. Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008
16 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

17 Under the AEDPA, a federal court must dismiss a second or
18 successive petition that raises the same grounds as a prior
19 petition. 28 U.S.C. § 2244(b)(1). The Court must also dismiss a
20 second or successive petition raising a new ground unless the
21 petitioner can show that 1) the claim rests on a new,
22 retroactive, constitutional right or 2) the factual basis of the
23 claim was not previously discoverable through due diligence, and
24 the new facts establish by clear and convincing evidence that but

25
26 ¹ The Court may take judicial notice of court records. Fed. R. Evid.
27 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993);
28 Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D. Cal. 1978),
aff'd, 645 F.2d 699 (9th Cir. 1981).

The Court notes that the case number of the proceeding as reflected in
the orders issued in the case, including the judgment entered on June 14,
2000, is CV F 99 5591 SMS P. (Doc. 29.)

1 for the constitutional error, no reasonable factfinder would have
2 found the applicant guilty of the underlying offense. 28 U.S.C.
3 § 2244(b)(2)(A)-(B).

4 However, it is not the district court that decides whether a
5 second or successive petition meets these requirements, which
6 allow a petitioner to file a second or successive petition.

7 Section 2244(b)(3)(A) provides, "Before a second or successive
8 application permitted by this section is filed in the district
9 court, the applicant shall move in the appropriate court of
10 appeals for an order authorizing the district court to consider
11 the application." In other words, a petitioner must obtain leave
12 from the Ninth Circuit before he or she can file a second or
13 successive petition in district court. See Felker v. Turpin, 518
14 U.S. 651, 656-657 (1996). This Court must dismiss any claim
15 presented in a second or successive habeas corpus application
16 under section 2254 that was presented in a prior application
17 unless the Court of Appeals has given Petitioner leave to file
18 the petition. 28 U.S.C. § 2244(b)(1). This limitation has been
19 characterized as jurisdictional. Burton v. Stewart, 549 U.S.
20 147, 152 (2007); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th
21 Cir. 2001).

22 A disposition is "on the merits" if the district court
23 either considered and rejected the claim, or determined that the
24 underlying claim would not be considered by a federal court.
25 McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009) (citing
26 Howard v. Lewis, 905 F.2d 1318, 1322 (9th Cir. 1990)). A
27 dismissal of a federal habeas petition on the ground of
28 untimeliness is a determination "on the merits" for purposes of

1 the rule against successive petitions such that a further
2 petition challenging the same conviction is "second or
3 successive" for purposes of 28 U.S.C. § 2244(b). McNabb v.
4 Yates, 576 F.3d 1028, 1029-30 (9th Cir. 2009). This is because
5 such a dismissal is a permanent and incurable bar to federal
6 review of the underlying claims. Id. at 1030.

7 Here, the first petition concerning Petitioner's conviction
8 was dismissed on the ground that it was untimely. Thus, the
9 petition was adjudicated on the merits.

10 Petitioner makes no showing that he has obtained prior leave
11 from the Ninth Circuit to file his successive petition attacking
12 the conviction. Petitioner contends that his claims are new and
13 that he could not have known of them earlier; thus, his petition
14 is not successive. However, it is for the Ninth Circuit Court of
15 Appeals, and not this Court, to determine whether Petitioner
16 meets the requirements that would permit the filing of a second
17 petition.

18 That being so, this court has no jurisdiction to consider
19 Petitioner's renewed application for relief from that conviction
20 under section 2254 and must dismiss the petition. See, Felker v.
21 Turpin, 518 U.S. 651, 656-57; Burton v. Stewart, 549 U.S. 147,
22 152; Cooper v. Calderon, 274 F.3d 1270, 1274. If Petitioner
23 desires to proceed in bringing this petition for writ of habeas
24 corpus, he must file for leave to do so with the Ninth Circuit.
25 See 28 U.S.C. § 2244(b) (3).

26 Accordingly, it will be recommended that the motion to
27 dismiss the petition as successive be granted.

28 Further, because this Court lacks subject matter

1 jurisdiction over the petition, the Court will not consider
2 Respondent's additional ground for the motion to dismiss, namely,
3 that the petition is untimely.

4 IV. Certificate of Appealability

5 Unless a circuit justice or judge issues a certificate of
6 appealability, an appeal may not be taken to the Court of Appeals
7 from the final order in a habeas proceeding in which the
8 detention complained of arises out of process issued by a state
9 court. 28 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537
10 U.S. 322, 336 (2003). A certificate of appealability may issue
11 only if the applicant makes a substantial showing of the denial
12 of a constitutional right. 28 U.S.C. § 2253(c)(2). Under this
13 standard, a petitioner must show that reasonable jurists could
14 debate whether the petition should have been resolved in a
15 different manner or that the issues presented were adequate to
16 deserve encouragement to proceed further. Miller-El v. Cockrell,
17 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S. 473, 484
18 (2000)). A certificate should issue if the Petitioner shows that
19 jurists of reason would find it debatable whether the petition
20 states a valid claim of the denial of a constitutional right and
21 that jurists of reason would find it debatable whether the
22 district court was correct in any procedural ruling. Slack v.
23 McDaniel, 529 U.S. 473, 483-84 (2000).

24 In determining this issue, a court conducts an overview of
25 the claims in the habeas petition, generally assesses their
26 merits, and determines whether the resolution was wrong or
27 debatable among jurists of reason. Miller-El v. Cockrell, 537
28 U.S. at 336-37. It is necessary for an applicant to show more

1 than an absence of frivolity or the existence of mere good faith;
2 however, it is not necessary for an applicant to show that the
3 appeal will succeed. Id. at 338.

4 A district court must issue or deny a certificate of
5 appealability when it enters a final order adverse to the
6 applicant. Rule 11(a) of the Rules Governing Section 2254 Cases.

7 Here, Petitioner has not demonstrated that jurists of reason
8 would find it debatable whether or not the petition states a
9 valid claim of the denial of a constitutional right. Further,
10 Petitioner has not shown that jurists of reason would find it
11 debatable whether the petition is successive. Petitioner has not
12 made the substantial showing required for issuance of a
13 certificate of appealability.

14 Therefore, it will be recommended that the Court decline to
15 issue a certificate of appealability.

16 V. Recommendations

17 Accordingly, it is RECOMMENDED that:

18 1) Respondent's motion to dismiss the petition as
19 successive be GRANTED; and

20 2) The petition for writ of habeas corpus be DISMISSED
21 because the Court lacks subject matter jurisdiction over the
22 petition; and

23 3) The Court DECLINE to issue a certificate of
24 appealability; and

25 4) The Clerk be DIRECTED to close this action because the
26 dismissal will terminate the action in its entirety.

27 These findings and recommendations are submitted to the
28 United States District Court Judge assigned to the case, pursuant

1 to the provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of
2 the Local Rules of Practice for the United States District Court,
3 Eastern District of California. Within thirty (30) days after
4 being served with a copy, any party may file written objections
5 with the Court and serve a copy on all parties. Such a document
6 should be captioned "Objections to Magistrate Judge's Findings
7 and Recommendations." Replies to the objections shall be served
8 and filed within fourteen (14) days (plus three (3) days if
9 served by mail) after service of the objections. The Court will
10 then review the Magistrate Judge's ruling pursuant to 28 U.S.C.
11 § 636 (b) (1) (C). The parties are advised that failure to file
12 objections within the specified time may waive the right to
13 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
14 1153 (9th Cir. 1991).

15 IT IS SO ORDERED.

16 Dated: December 23, 2011

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE

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