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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PAUL C. BOLIN,  
  
  Petitioner,  
  
  v.  
  
RON DAVIS, Warden of San Quentin State  
Prison,  
  
  Respondent.

Case No. 1:17-cv-00985-LJO-SAB  
  
ORDER DIRECTING PETITIONER TO PAY  
FILING FEE OR SUBMIT IFP  
APPLICATION  
  
[30 Day Deadline]  
  
FINDINGS AND RECOMMENDATIONS (1)  
DENYING MOTION TO TRANSFER CASE,  
(2) SUMMARILY DISMISSING  
SUCCESSIVE PETITION FOR WRIT OF  
HABEAS CORPUS, and (3) DENYING  
CERTIFICATE OF APPEALABILITY  
  
[30 Day Objection Deadline]  
  
Clerk to Serve Petitioner’s Counsel on Appeal

On May 11, 2017, Paul C. Bolin (hereinafter “Petitioner”), a prisoner in state custody proceeding pro se, filed with the United States District Court for the Northern District of California a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (hereinafter “Petition”), naming as respondents the Kern County Superior Court and the Honorable Michael E. Delostritto (hereinafter collectively “Respondent”).<sup>1</sup> (ECF No. 1.) Therein Petitioner challenges his 1991 conviction and death sentence following jury trial on two counts of first degree murder for which the multiple murder special circumstance was found true, one count of

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<sup>1</sup> The Clerk of the Court is directed to name Ron Davis, Warden of San Quentin State Prison, as Respondent in place of the Kern County Superior Court and the Honorable Michael E. Delostritto. (See ECF No. 2.)

1 attempted first degree murder, and one count of marijuana cultivation. People v. Bolin, Kern  
2 County Superior Court Case No. 41477-A.

3 Petitioner argues in the Petition and a separate letter to the Court that the record on appeal  
4 is insufficient to support the trial court's jurisdiction to render the 1991 judgment upon conviction  
5 because the record is incomplete, improperly certified and fraudulently modified. (ECF Nos. 1 &  
6 6.) He argues the 1991 judgment against him is void, entitling him to relief. (Id.)

7 Petitioner previously filed a federal habeas petition in this Court, Paul C. Bolin v. Ron  
8 Davis, Case No. 1:99-cv-05279-LJO-SAB, ("First Habeas Action") challenging the same  
9 conviction and sentence.<sup>2</sup> On June 9, 2016, the Court denied relief in the First Habeas Action,  
10 issued a certificate of appealability as to certain claims therein and entered judgment thereon.  
11 (First Habeas Action, ECF Nos. 350 & 351.) On August 30, 2016, the Court denied Petitioner's  
12 Rule 59(e) motion to alter or amend the judgment. (First Habeas Action, ECF No. 356.) On  
13 September 26, 2016, Petitioner, through counsel, filed a notice of appeal from the Court's  
14 judgment. (First Habeas Action, ECF No. 357.) The appeal remains pending. See Ninth Circuit  
15 Case No. 16-99009. Petitioner is represented on appeal by the same counsel who represented him  
16 in the First Habeas Action.

17 On May 30, 2017, the Northern District court ordered that the instant action be transferred  
18 to this Court because the conviction being challenged was rendered in Kern County. (ECF Nos. 2  
19 & 3.)

20 On July 25, 2017, the Court issued an order authorizing Petitioner to proceed in forma  
21 pauperis ("IFP"). (ECF No. 5; see 28 U.S.C. § 1915(a).)

22 On August 2, 2017, Petitioner filed notice declining to proceed IFP. (ECF No. 7.)

23 On August 9, 2017, Petitioner declined jurisdiction of a United States Magistrate Judge  
24 (ECF Nos. 4 & 9), and moved to transfer this action back to the Northern District on jurisdictional  
25 grounds (ECF No. 10).

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27 <sup>2</sup> Pursuant to Federal Rule of Evidence 201, the Court takes judicial notice of the records in the First Habeas Action.  
28 United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993) (the court may take judicial notice of court records).

1 **I. PRIOR PROCEEDINGS**

2 On September 19, 1989, Petitioner was charged with the following offenses: the murder of  
3 Steve Mincy, pursuant to Penal Code section 187 (Count I), the murder of Vance Huffstuttler,  
4 pursuant to Penal Code section 187 (Count II), the attempted murder of James Wilson, pursuant  
5 to Penal Code section 664/187 (Count III), and the cultivation of marijuana in violation of Health  
6 and Safety Code section 11358 (Count IV). (First Habeas Action, CT at 125-129.)<sup>3</sup> Counts I-III  
7 included alleged use of a firearm. Counts I and II included alleged multiple murder, a special  
8 circumstance under Penal Code section 190.2(a)(3). All counts alleged that Petitioner had  
9 suffered a prior conviction for a serious felony.

10 The jury was sworn on December 3, 1990. (First Habeas Action, CT at 372.) On  
11 December 12, 1990, the jury found Petitioner guilty on all counts and enhancements and found  
12 the special circumstance to be true. (First Habeas Action, CT at 400-409.) On December 13,  
13 1990, the jury found true the allegation of a prior conviction. (CT at 519-521, 524.) The penalty  
14 phase began on January 22, 1991. (First Habeas Action, CT at 584-589.) The jury returned a  
15 verdict of death on January 24, 1991. (First Habeas Action, CT at 626.)

16 On February 25, 1991, the trial court denied Petitioner’s motion to modify the verdict and  
17 sentenced Petitioner to death on the capital Counts. (First Habeas Action, RT 2/25/91 at 18-27.)  
18 The trial court also sentenced Petitioner to the upper term of nine years for attempted  
19 premeditated murder (Count III), three years with a stayed one-year enhancement for marijuana  
20 cultivation (Count IV), two years for the firearm enhancement, and five years for the serious  
21 felony enhancement. (First Habeas Action, CT at 668-670; RT 2/25/91 at 24-27.)

22 On June 18, 1998, the California Supreme Court affirmed the judgment and sentence on  
23 direct appeal. People v. Bolin, 18 Cal. 4th 297 (1998), as modified on denial of reh'g (Aug. 12,  
24 1998).

25 Petition for writ of certiorari was denied by the United States Supreme Court on March 8,  
26 1999. Bolin v. California, 526 U.S. 1006 (1999).

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28 <sup>3</sup> “CT” refers to the Clerk’s Transcript on Appeal. “RT” refers to the Reporter’s Transcript on Appeal. Any  
reference to state law is to California law unless otherwise noted.

1 **II. DISCUSSION**

2 **A. Failure to Proceed IFP or Pay Filing Fee**

3 All parties proceeding on a writ of habeas corpus must pay a filing fee of \$5. 28 U.S.C. §  
4 1914(a); Rules Governing § 2254 Cases in the United States District Courts (hereinafter “Habeas  
5 Rule(s)”), Rule 3. Such an action may proceed despite a party’s failure to pay only if the party is  
6 granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). Rodriguez v. Cook, 169 F.3d  
7 1176, 1177 (9th Cir. 1999).

8 Here, Petitioner has declined the Court’s grant of IFP status. (ECF Nos. 5 & 7.) He has  
9 not paid the \$5 filing fee to commence this action required by 28 U.S.C. § 1914(a). Therefore,  
10 the action is subject to immediate dismissal pursuant to 28 U.S.C. § 1914(a).

11 The Court will allow Petitioner one final opportunity to either pay the \$5 filing fee or file  
12 an application to proceed IFP. Failure to comply will result in dismissal without prejudice of this  
13 proceeding without further notice.

14 **B. Duty to Screen**

15 This Court has a duty to screen habeas corpus petitions. See Habeas Rule 4 Advisory  
16 Committee Notes. Habeas Rule 4 requires a district court to examine a habeas corpus petition,  
17 and if it plainly appears from the face of the petition and any annexed exhibits that the petitioner  
18 is not entitled to relief, the judge shall make an order for summary dismissal of the petition. Id.;  
19 see also O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990); Hendricks v. Vasquez, 908 F.2d  
20 490, 491 (9th Cir. 1990).

21 Habeas Rule 2(c) requires that a petition 1) specify all grounds of relief available to the  
22 petitioner; 2) state the facts supporting each ground; and 3) state the relief requested. Notice  
23 pleading is not sufficient; rather, the petition must state facts that point to a real possibility of  
24 constitutional error. Habeas Rule 4 Advisory Committee Notes; O'Bremski, 915 F.2d at 420  
25 (quoting Blackledge v. Allison, 431 U.S. 63, 75 at n.7 (1977)). Allegations in a petition that are  
26 vague, conclusory, palpably incredible, patently frivolous, or false are subject to summary  
27 dismissal. Hendricks, 908 F.2d at 491.

28 Further, the Court may dismiss a petition for writ of habeas corpus either on its own

1 motion under Habeas Rule 4, pursuant to the respondent's motion to dismiss, or after an answer to  
2 the petition has been filed. Habeas Rule 8 Advisory Committee Notes; see also Herbst v. Cook,  
3 260 F.3d 1039, 1042–43 (9th Cir. 2001).

4 A petition for writ of habeas corpus should not be dismissed without leave to amend  
5 unless it appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v.  
6 Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

### 7 **C. Jurisdiction and Venue**

8 Relief by way of a petition for writ of habeas corpus extends to a person in custody  
9 pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws  
10 or treaties of the United States. 28 U.S.C. §§ 2241(c)(3), 2254(a); see also Williams v. Taylor,  
11 529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed  
12 by the U.S. Constitution.

13 The challenged 1991 conviction and sentence arise out of the Kern County Superior  
14 Court, which is located within the jurisdiction of this Court. 28 U.S.C. §§ 1404(a), 2241(d),  
15 2254(a).

16 Accordingly, this Court as the district of conviction is vested with jurisdiction over the  
17 Petition.

### 18 **D. Successive Petition**

19 Because the Petition was filed after April 24, 1996, the effective date of the Antiterrorism  
20 and Effective Death Penalty Act of 1996 (AEDPA), the AEDPA applies to the Petition. Lindh v.  
21 Murphy, 521 U.S. 320, 327 (1997).

22 The Petition must be dismissed as a successive petition over which this Court lacks  
23 jurisdiction. The AEDPA, in pertinent part, provides that

24 A claim presented in a second or successive habeas corpus application under  
25 section 2254 that was presented in a prior application shall be dismissed.

26 A claim presented in a second or successive habeas corpus application under  
27 section 2254 that was not presented in a prior application shall be dismissed  
28 unless-

[T]he applicant shows that the claim relies on a new rule of  
constitutional law, made retroactive to cases on collateral review by

1 the Supreme Court, that was previously unavailable; or

2 [T]he factual predicate for the claim could not have been  
3 discovered previously through the exercise of due diligence; and

4 [T]he facts underlying the claim, if proven and viewed in light of  
5 the evidence as a whole, would be sufficient to establish by clear  
6 and convincing evidence that, but for constitutional error, no  
7 reasonable factfinder would have found the applicant guilty of the  
8 underlying offense.

9 Before a second or successive application permitted by this section is filed in the  
10 district court, the applicant shall move in the appropriate court of appeals for an  
11 order authorizing the district court to consider the application.

12 28 U.S.C. § 2244(b)(1)-(3)(A); see also Habeas Rule 9. This determination must be made by the  
13 United States Court of Appeals upon petitioner's motion for an order authorizing the district court  
14 to consider his second or successive petition. 28 U.S.C. § 2244(b); see also Burton v. Stewart,  
15 549 U.S. 147, 157 (2007) (where petitioner did not receive authorization from court of appeals  
16 before filing second or successive petition, “the [d]istrict [c]ourt was without jurisdiction to  
17 entertain [the petition]”).

18 The AEDPA “greatly restricts the power of federal courts to award relief to state prisoners  
19 who file second or successive habeas corpus applications.” Tyler v. Cain, 533 U.S. 656, 661  
20 (2001). The AEDPA “creates a gatekeeping mechanism for the consideration of second or  
21 successive applications in district court.” Felker v. Turpin, 518 U.S. 651, 657 (1996); see also  
22 Stewart v. Martinez-Villarreal, 523 U.S. 637, 641 (1998). Second or successive habeas petitions  
23 are subject to the “extremely stringent” requirements of the AEDPA. Babbitt v. Woodford, 177  
24 F.3d 744, 745 (9th Cir. 1999).

25 “Before a second or successive application permitted by this section is filed in the district  
26 court, the applicant shall move in the appropriate court of appeals for an order authorizing the  
27 district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). Second or successive  
28 habeas petitions filed in the district court without an authorizing order from the court of appeals  
shall be dismissed. See 28 U.S.C. § 2244(b); see also Burton, 549 U.S. at 153 (where petitioner  
neither sought nor received authorization from court of appeals before filing second or successive  
petition, district court should have dismissed the petition for lack of jurisdiction). “When the

1 AEDPA is in play, the district court may not, in the absence of proper authorization from the  
2 court of appeals, consider a second or successive habeas application.” Cooper v. Calderon, 274  
3 F.3d 1270, 1274 (9th Cir. 2001) (quoting Libby v. Magnusson, 177 F.3d 43, 46 (1st Cir. 1999)).  
4 This limitation has been characterized as jurisdictional. Burton, 549 U.S. at 152; see also Cooper,  
5 274 F.3d at 1274.

6 Although the AEDPA does not specify what constitutes a “second or successive” petition,  
7 Hill v. Alaska, 297 F.3d 895, 897 (9th Cir. 2002), “the Supreme Court, the Ninth Circuit, and its  
8 sister circuits have interpreted [the term] . . . as derivative of the abuse-of-the-writ doctrine  
9 developed in pre-AEDPA cases.” Id. at 897–98; see also Felker, 518 U.S. at 664.

10 Under the abuse of the writ doctrine, a petition is “second or successive” if it raises claims  
11 that were or could have been adjudicated on their merits in an earlier petition. See McCleskey v.  
12 Zant, 499 U.S. 467, 494–95 (1991); see also Thompson v. Calderon, 151 F.3d 918, 920–21 (9th  
13 Cir. 1998) (a petition need not be repetitive to be second or successive); Cooper, 274 F.3d at 1273  
14 (citing 28 U.S.C. § 2244(b)(2)). Claims that could have been adjudicated in an earlier petition  
15 may not be considered “unless the petitioner can show (1) cause for bringing a successive petition  
16 and that prejudice would result or (2) that a fundamental miscarriage of justice would result from  
17 failure to entertain the claim.” Alaimalo v. U.S., 645 F.3d 1042, 1049 (9th Cir. 2011) (quoting  
18 Calderon v. United States Dist. Ct., 163 F.3d 530, 538 (9th Cir. 1998)) (abrogated in part on other  
19 grounds by Woodford v. Garceau, 538 U.S. 202, 206 (2003)); see also McCleskey, 499 U.S. at  
20 494-95.

21 Here, the Petition challenges the same 1991 conviction and sentence that Petitioner  
22 challenged in the First Habeas Action. The petition in the First Habeas Action was denied  
23 following merits analysis rather than for technical or procedural reasons. (First Habeas Action,  
24 ECF No. 350 at 304-05);<sup>4</sup> see McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009) (citing  
25 Howard v. Lewis, 905 F.2d 1318, 1322 (9th Cir. 1990)) (a disposition is “on the merits” if the

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27 <sup>4</sup> Reference to page numbering is to the page numbering in the original document except Bates numbering is used for  
28 the CT, and ECF system numbering is used for electronically filed documents.

1 district court either considered and rejected a claim, or determined that an underlying claim would  
2 not be considered by a federal court); cf. Slack v. McDaniel, 529 U.S. 473, 485-87 (2000) (habeas  
3 petition filed after a prior habeas petition was dismissed without adjudication on the merits for  
4 failure to exhaust state remedies is not a “second or successive petition”).

5 The Petition’s allegation that the record on appeal is incomplete, improperly certified and  
6 fraudulently modified was presented in the First Habeas Action. The First Habeas Action  
7 included and this Court considered and denied claimed ineffective assistance of appellate counsel  
8 including as to failure to perfect the record on appeal as certified by Kern County Superior Court  
9 Judge Oberholzer. (First Habeas Action, ECF No. 350 at 297; see also ECF No. 1 at 41.)

10 Petitioner has not proffered any new evidence or cited any new rule of constitutional law  
11 that would arguably allow him to file a habeas petition on such a claim. See Hill, 297 F.3d at  
12 899. The Petition refers to a separate petition for writ of habeas corpus filed by Petitioner on  
13 January 24, 2017 in the Kern County Superior Court and denied by that court. (ECF No. 1 at 5  
14 citing Kern County Superior Court Case No. HC 015383A.) However, that state petition appears  
15 to challenge the same 1991 conviction and sentence that Petitioner challenged in the First Habeas  
16 Action.

17 Accordingly, the Petition is “second or successive” for purposes of 28 U.S.C. § 2244. See  
18 Burton, 549 U.S. at 153 (petition found “second or successive” where it challenged custody  
19 imposed by the same judgment challenged in the initial petition). Under the AEDPA, Petitioner  
20 was required to obtain an order from the Ninth Circuit authorizing the Court to consider his  
21 claims prior to filing this case. Because he did not do so, this Court is without jurisdiction to  
22 entertain the Petition. Id.; see also 28 U.S.C. § 2244(b)(3)(A).<sup>5</sup>

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24 \_\_\_\_\_  
25 <sup>5</sup> Ninth Circuit Rule 22-3(a) provides that “if an application for authorization to file a second or successive section  
26 2254 petition ... is mistakenly submitted to the district court, the district court shall refer it to the court of appeals.”  
27 Here, the Petition is clearly a second or successive habeas petition. There is no indication that it is actually an  
28 application for authorization to file a second or successive petition that Petitioner mistakenly filed here, and the  
undersigned declines to construe it as such. If Petitioner seeks authorization to file a second or successive habeas  
petition, he should submit his application directly to the Ninth Circuit Court of Appeals in compliance with Ninth  
Circuit Rule 22-3.



1           **E. Certificate of Appealability**

2           Under the AEDPA, a state prisoner seeking to appeal a district court's final order in a  
3 habeas corpus proceeding must obtain a Certificate of Appealability (“COA”) from the district  
4 judge or a circuit judge. 28 U.S.C. § 2253(c)(1)(A); see also Miller–El v. Cockrell, 537 U.S. 322,  
5 336 (2003). A district court must issue or deny a COA when it enters a final order adverse to the  
6 applicant. See Habeas Rule 11(a).

7           A COA may issue “only if the applicant has made a substantial showing of the denial of a  
8 constitutional right.” Id. at § 2253(c)(2); accord Williams v. Calderon, 83 F.3d 281, 286 (9th Cir.  
9 1996). “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree  
10 with the district court's resolution of his constitutional claims or that jurists could conclude the  
11 issues presented are adequate to deserve encouragement to proceed further.” Miller–El, 537 U.S.  
12 at 327; see also Slack, 529 U.S. at 483-84. In determining these issues, a court conducts an  
13 overview of the claims in the habeas petition, generally assesses their merits, and determines  
14 whether the resolution was debatable among jurists of reason or wrong. Miller–El, 537 U.S. at  
15 338.

16           When a district court dismisses a petition on procedural grounds, the reviewing court  
17 should apply a two-step analysis, and a COA should issue if the petitioner can show both: (1)  
18 “that jurists of reason would find it debatable whether the district court was correct in its  
19 procedural ruling[;]” and (2) “that jurists of reason would find it debatable whether the petition  
20 states a valid claim of the denial of a constitutional right[.]” Slack, 529 U.S. at 478.

21           Since the Petition is clearly a second or successive petition, Petitioner cannot make the  
22 requisite showing “that jurists of reason would find it debatable whether the district court was  
23 correct in its procedural ruling.” Id.

24   **III. ORDER**

25           For the reasons stated, **IT IS ORDERED THAT** within thirty (30) days after being served  
26 with this order Petitioner shall either pay the \$5 filing fee or file an application to proceed IFP.  
27 Failure to comply will result in dismissal without prejudice of this proceeding without further  
28 notice.

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**IV. FINDINGS AND RECOMMENDATIONS**

For the reasons stated, IT IS HEREBY RECOMMENDED that (1) the motion to transfer the action back to the Northern District (ECF No. 10) be denied; (2) the Petition (ECF No. 1) be dismissed without prejudice for lack of jurisdiction, and (3) a Certificate of Appealability be denied.

These Findings and Recommendations are submitted to the assigned District Judge, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30) days after being served with these findings and recommendations, Petitioner may file written objections with the Court and serve a copy on any and all parties of record. Such a document should be captioned “Objections to Magistrate Judge's Findings and Recommendations.” Any reply to the objections by a party of record shall be served and filed within fourteen (14) days after service of the objections. Failure to file objections within the specified time may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014).

**V. DIRECTION TO CLERK REGARDING SERVICE**

The Clerk of the Court is directed to serve this Order and these Findings and Recommendations upon Petitioner’s counsel on the pending appeal, Robert Bacon, Esq. and Brian Abbington, Esq. of the Office of the Federal Defender.

IT IS SO ORDERED.

Dated: August 16, 2017

  
UNITED STATES MAGISTRATE JUDGE