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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DJONTE LEE JOHNSON,
Petitioner,
v.
Warden,
Respondent.

Case No. 1:17-cv-01697-MJS (HC)

**ORDER DIRECTING CLERK OF COURT TO
ASSIGN A DISTRICT JUDGE TO THIS
MATTER**

FINDINGS AND RECOMMENDATIONS TO:

**(1) CONSTRUE PETITION AS A MOTION
TO AMEND THE PETITION IN CASE NO.
1:17-cv-1685-MJS; AND**

**(2) ADMINISTRATIVELY CLOSE THIS
ACTION**

(ECF No. 1)

THIRTY (30) DAY OBJECTION DEADLINE

Petitioner is detained at the Fresno County Jail awaiting sentencing following a jury trial that resulted in an April 25, 2017 conviction for first degree murder with various enhancements. (ECF No. 1.) He is proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging alleged constitutional defects that

1 occurred during trial in the Fresno County Superior Court. He has not appealed the
2 conviction.

3 This action was filed on December 12, 2017.¹ The Court takes judicial notice of
4 Johnson v. On Habeas Corpus, No. 1:17-cv-01685-MJS, filed by Petitioner on December
5 11, 2017, which challenges the same conviction.

6 **I. Procedural Grounds for Summary Dismissal**

7 Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a
8 preliminary review of each petition for writ of habeas corpus. The Court must dismiss a
9 petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to
10 relief." Rule 4 of the Rules Governing § 2254 Cases; Hendricks v. Vasquez, 908 F.2d
11 490 (9th Cir. 1990). The Advisory Committee Notes to Rule 8 indicate that the court may
12 dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4,
13 pursuant to the respondent's motion to dismiss, or after an answer to the petition has
14 been filed. A petition for habeas corpus should not be dismissed without leave to amend
15 unless it appears that no tenable claim for relief can be pleaded were such leave
16 granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

17 **II. Second Petition Challenging Same Conviction**

18 Federal courts retain broad powers to control their dockets and "prevent
19 duplicative or unnecessary litigation." Slack v. McDaniel, 529 U.S. 473, 478 (2000); Link
20 v. Wabash R. Co., 370 U.S. 626, 630-631 (1962). "After weighing the equities of the
21 case, the district court may exercise its discretion to dismiss a duplicative later-filed
22 action, to stay that action pending resolution of the previously filed action, to enjoin the
23 parties from proceeding with it, or to consolidate both actions." Adams v. California Dept.
24 of Health Services, 487 F.3d 684, 688 (9th Cir. 2007). "Plaintiffs generally have 'no right
25 to maintain two separate actions involving the same subject matter at the same time in
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27 ¹ Under the mailbox rule, the Court deems petitions filed on the date Petitioner handed a petition to prison
28 authorities for mailing. Houston v. Lack, 487 U.S. 266, 276 (1988); Campbell v. Henry, 614 F.3d 1056 (9th
Cir. 2010); see also Rule 3(d) of the Rules Governing Section 2254 Cases.

1 the same court and against the same defendant.” Id. (quoting Walton v. Eaton Corp.,
2 563 F.2d 66, 70 (3d Cir.1977) (en banc)).

3 Additionally, 28 U.S.C. § 2244(b) limits the number of separate habeas actions
4 that a state prisoner may bring arising out of the same state court conviction and/or
5 sentence. When a pro se petitioner files a second Section 2254 habeas petition
6 challenging a particular state conviction before the district court completes its
7 adjudication of his earlier Section 2254 habeas petition stemming from the same state
8 court criminal case, the district court should construe the second petition as a motion to
9 amend the earlier-filed petition. Woods v. Carey, 525 F.3d 886, 890 (9th Cir. 2008) (so
10 holding and further holding that the court thereafter has the discretion to determine
11 whether to grant leave to amend consistent with Fed. R. Civ. P. 15); see also Goodrum
12 v. Busby, 824 F.3d 1188, 1194 (9th Cir. 2016) (reiterating that Woods is “the law of our
13 circuit”).

14 Here, Case Nos. 1:17-cv-01685 and 1:17-cv-01697 arise out of the same state
15 court criminal case. The petition in Case No. 1:17-cv-01697 should be filed as an
16 amended petition in Case No. 1:17-cv-01685, and the instant case should be
17 administratively closed.²

18 **III. Conclusion and Recommendation**

19 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 20 1. The petition (ECF No. 1) be filed as an amended petition in Case No. 1:17-
21 cv-01685-MJS;
- 22 2. Case No. 1:17-cv-01697 be administratively closed.

23 The findings and recommendations are submitted to the United States District
24 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within
25 thirty (30) days after being served with the findings and recommendations, any party
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27 ² Because Petitioner has not previously amended and Respondent has not responded to the petition in
28 Case No. 1:17-cv-01685, Petitioner does not require leave of Court to amend. Fed. R. Civ. P. 15(a)(1); see
Woods, 525 F.3d at 890 n.3.

1 may file written objections with the Court and serve a copy on all parties. Such a
2 document should be captioned "Objections to Magistrate Judge's Findings and
3 Recommendations." Any reply to the objections shall be served and filed within fourteen
4 (14) days after service of the objections. The parties are advised that failure to file
5 objections within the specified time may result in the waiver of rights on appeal.
6 *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923
7 F.2d 1391, 1394 (9th Cir. 1991)).

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9 IT IS SO ORDERED.

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Dated: December 26, 2017

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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