UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSHUA DANIEL MILLS, Petitioner, v. FRED FOULK, Respondent..	No. 2:14-cv-00513 WBS DAD P FINDINGS AND RECOMMENDATIONS

Petitioner is a former state prisoner proceeding with retained counsel in this habeas corpus action filed pursuant to 28 U.S.C. § 2254. Respondent moves to dismiss this action for lack of subject matter jurisdiction or, alternatively, because it is barred by the applicable statute of limitations. The motions came on for hearing before the undersigned on September 12, 2014, in accordance with Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1). Attorney Julia Young appeared on behalf of petitioner. Deputy Attorney General Larenda Delaini appeared on behalf of respondent. For the reasons set forth below, the undersigned will recommend that respondent's motion to dismiss be granted.

I. Introduction

When petitioner commenced this federal habeas action on February 19, 2014, he was incarcerated at High Desert State Prison pursuant to a 2011 judgment of conviction and sentence

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imposed under California's Three Strikes law.[1] In his pending application for habeas relief, however, petitioner purports to challenge a 2002 judgment of conviction that was counted as a "strike" when he was sentenced in connection with his 2011 judgment of conviction. Specifically, petitioner challenges the September 16, 2002 judgment of conviction and sentence entered against him in Placer County Superior Court in Case No. 62-026161, which was imposed pursuant to negotiated plea agreement under which petitioner entered a no contest plea on August 2, 2002. Before this court petitioner contends that: (1) his no contest plea in 2002 was not knowing or voluntary, and (2) the plea agreement he entered into at that time was violated. Specifically, petitioner asserts that the prosecutor failed to state a factual basis on the record for petitioner's plea in 2002 and that the court failed to advise petitioner of the consequences of his plea and of his right to withdraw it. Petitioner also contends that he never received the mental health treatment that he was promised to him as part of his 2002 plea agreement.

Respondent initially moved to dismiss this action for lack of subject matter jurisdiction based on the argument that, when petitioner filed the instant petition, he was not "in custody," within the meaning of 28 U.S.C. §2254(a), with respect to the 2002 judgment of conviction he seeks to challenge. Alternatively, respondent moved for dismissal of this habeas action on the ground that the petition was filed beyond the one-year statute of limitations set forth in 28 U.S.C. § 2244(d)(1). In reply, respondent also contends that petitioner's federal habeas action does not fall within the exception recognized in Dubrin v. California, 720 F.3d 1095 (9th Cir. 2013) authorizing federal habeas review of a conviction that is used to enhance a subsequently imposed sentence even where the sentence on the earlier conviction has fully expired.

II. Background

On August 2, 2002, petitioner, then age 23, entered no contest pleas in the in the Placer County Superior Court to making criminal threats in violation of California Penal Code § 422 (a

[1] Review of the Inmate Locator website operated by the California Department of Corrections and Rehabilitation (CDCR) indicates that petitioner is no longer incarcerated under the authority of the CDCR. See http://inmatelocator.cdcr.ca.gov/search.aspx. See also Fed. R. Evid. 201 (court may take judicial notice of facts that are capable of accurate determination by sources whose accuracy cannot reasonably be questioned).

felony), and exhibiting a deadly weapon in violation of California Penal Code § 417(a)(1) (a misdemeanor). (See Pet'r Ex. A, Aug. 2, 2002 Reporter's Transcript (RT) of Proceedings of Felony Guilty Plea (ECF No. 1-2 at 2-11); see also Resp't Lodged Document (LD) No. 1) and Pet'r Ex. O, Aug. 19, 2002 Probation Officer's Report (ECF No. 3 at 2-29)).[2] Petitioner's no contest pleas were entered pursuant to a plea agreement which also called for dismissal of seven additional counts brought against him to be dismissed with a "Harvey Waiver."[3] At the same 2002 hearing on his entry of plea, petitioner also entered a negotiated no contest plea in Case No. 62-28491, and admitted violating the terms of his probation in Case Nos. 62-3779 and 62-12533 by the same conduct underlying the new charges that had been brought against him.[4] (See Pet'r Ex. A, Aug. 2, 2002 RT of Felony Guilty Plea (ECF No. 1-2 at 2-11).)

On September 16, 2002, the Placer County Superior Court imposed sentence in all of the cases then pending against petitioner. (See Pet'r Ex. E, Sept. 16, 2002 RT of Hearing on Judgment and Sentencing (ECF No. 1-6 at 2-6); see also LD No. 1.) In Case No. 62-026161, imposition of sentence was suspended, petitioner was ordered to serve 183 days in county jail and

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[2] This court may take judicial notice of its own records and the records of other courts. See United States v. Howard, 381 F.3d 873, 876 n.1 (9th Cir. 2004); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); see also Fed. R. Evid. 201.

[3] The California Supreme Court's holding in People v. Harvey, 25 Cal. 3d 754 (1979), authorizes trial courts to impose restitution on a defendant based on a count that is subsequently dismissed pursuant to a plea bargain.

[4] Specifically, in Case No. 62-28491, petitioner pled no contest to violating California Penal Code § 236 (false imprisonment by violence, a felony); Penal Code § 273d (corporal injury to a child, a misdemeanor); Penal Code § 273.6(a) (disobeying a domestic relations court order, a misdemeanor); and a fourth count was dismissed with a "Harvey Waiver." (Pet'r. Ex. A (ECF No. 1-2 at 2-11); Pet'r Ex. O (ECF No. 3 at 2).) Petitioner also admitted violating his probation in Case No. 62-3779 (in which he was serving a three-year probation term for misdemeanor violation of former Penal Code § 166 (contempt of court), imposed October 1999); and Case No. 62-12533 (in which he was serving a three-year probation term for misdemeanor violation of Penal Code § 242 (battery), imposed February 2001). (ECF No. 1-2 at 8; ECF No. 3 at 8.)

was placed on probation for a period of five years.[5] (Id. at 3-4.) In November 2004, pursuant to the judgment of conviction in Case No. 62-026161, petitioner's probation was revoked and he was sentenced to a determinate term of eight months in state prison. (Mot. to Dismiss (ECF No. 21 at 2, 3); LD 2 at 3.) Petitioner did not seek direct review of that judgment and sentence. Effective August 27, 2009, petitioner was discharged from custody on Case No. 62-026161 based on time served,[6] thus rendering his sentence on his 2002 conviction fully expired. (Mot. to Dismiss (ECF No. 21 at 3); LD 12 (see attached "Court Commitment")).[7]

On May 25, 2010, counsel for petitioner filed a request to stay his trial on new criminal charges that had been brought against petitioner in in the Placer County Superior Court Case No. 62-84322 involving charges of assault and battery on a peace officer. At the same time petitioner's counsel filed a petition for writ of habeas corpus challenging petitioner' 2002 judgment of conviction in Case No. 62-026161, the same conviction petitioner purports to challenge in this federal habeas action. (LD 3 (Pet. for Writ of Habeas Corpus filed in the Placer County Superior Court on May 25, 2010)). Specifically, that state habeas petition challenged the validity of petitioner's 2002 judgment of conviction and its potential designation as a "strike" under California's "Three Strikes Law," at a future sentencing in the then-pending Case No. 62-84322. (See LD 3.) Petitioner contended therein that "[t]here is no set time limit for filing a state petition for writ of habeas corpus" (citing In re James, 38 Cal.2d 302 (1952)), and "[t]he issues set forth in this writ did not come to light until after a careful review of the change of plea transcript." (Id. at 9.) Noting that these issues arose in motions in limine in the then-pending

[5] Consecutive sentences were imposed on petitioner in petitioner's other three pending cases, as follows: in Case No. 62-28491, he was sentenced to serve 182 days in county jail, with credit for time served; in Case Nos. 62-3779 and 62-12533, he was sentenced to 30 days in county jail with termination of probation upon completion of each respective custody term. (Pet'r Ex. E, Sept. 16, 2002 RT of Judgment and Sentencing (ECF No. 1-6 at 4)).

[6] On the same date, petitioner was discharged from Case No. 62-28491, based on time served. (LD 12 ("Court Commitment").)

[7] At the hearing before this court on the pending motion to dismiss, respondent's counsel stated that Lodged Document No. 13 contained petitioner's discharge papers. It appears, however, that the intended document was inadvertently attached to Lodged Document No. 12 and that no Lodged Document No. 13 was submitted to this court.

criminal prosecution against petitioner, Case No. 62-84322, the Superior Court issued an order to show cause, obtained additional briefing, and held an evidentiary hearing that including the taking of testimony from petitioner's trial counsel in the 2002 prosecution, Case No. 62-026161. (LD 4 at 3.)

On October 4, 2010, the Placer County Superior Court granted the petition for writ of habeas corpus, set aside the 2002 judgment. (See Pet'r Ex. O, Oct. 4, 2010 Order Granting Writ of Habeas Corpus (ECF No. 3-1 at 2-10); also at LD 4.) In so ruling, the Superior Court found that petitioner misunderstood the nature of his plea in 2002, because a "West plea"[8] does not authorize the maintenance of innocence but concedes guilt on lesser included offenses; that neither the prosecutor nor the trial court stated a factual basis for the plea; and that the trial court failed to inform petitioner of the possible consequences of his plea. The Superior Court concluded that these "three separate and weighty factors . . . combined to bring about a plea which this court finds to be lacking in the constitutional safeguards which provide courts with the confidence that they got it right." (Id., ECF No. 3-1 at 8.) The Superior Court also continued petitioner's trial in the new criminal case, Case No. 62-84322, that had been brought against him. (Id. at 9.)

On November 12, 2010, respondent filed a notice of appeal from the Superior Court's order granting habeas relief. (LD 5.) On September 9, 2011, the California Court of Appeal for the Third Appellate District, reversed the grant of habeas relief and remanded the case with directions to the Superior Court to deny the petition.[9] (See Pet'r Ex. H, Sept. 9, 2011 Decision of California Court of Appeal (ECF No. 1-9 at 2-15); see also LD 9 and In re Mills, 2011 WL

[8] The California Supreme Court's holding in People v. West, 3 Cal. 3d 595, 60 (1970), authorizes trial courts to approve plea bargains in which the defendant agrees to plead guilty or no contest to an uncharged lesser offense in order to obtain a more lenient sentence. See In re Mills, 2011 WL 4005394, at *4 (Cal. App. 3d, Sept. 9, 2011). The undersigned would also note that the Ninth Circuit has held that that no constitutional issue cognizable under § 2254 exists, despite citations to West, where the state trial court's failure to find a factual basis for a no contest plea is "unaccompanied by protestations of innocence." Loftis v. Almager, 704 F.3d 645, 648 (9th Cir. 2012), cert. denied ___U.S.___, 134 S. Ct. 107 (2013).

[9] This directive was not implemented until April 30, 2014. (LD 10.)

4005394 (Cal. App. 3d, Sept. 9, 2011). The California Court of Appeal found that petitioner's 2002 plea was voluntarily entered and that the terms of his plea agreement in that case had not been violated. The state appellate court also found that, although the plea was mischaracterized as a West plea and should have instead been characterized as an Alford[10] plea, petitioner's "belief in his innocence does not vitiate his plea's validity" because other facts noted in the probation report supported his guilt. In re Mills, 2011 WL 4005394 at *4. In addition, the court found that the facts set forth in petitioner's 2002 probation report rendered harmless the error of the trial court in failing to determine by independent inquiry at the time the plea was entered whether a factual basis existed for that plea. Id. at *3-4. The state appellate court also concluded that the trial court's failure to advise petitioner of the consequences of his plea did not undermine its voluntariness and was not prejudicial because "[i]t is inconceivable" that petitioner would have rejected a plea bargain calling for no prison time and potential mental health treatment "had he been informed of the sentencing range for criminal threats, a consequence contingent upon probation being terminated at some later date." Id. at *4-5. Finally, the state appellate court found that petitioner's plea agreement had not been violated because the evidence of record indicated that petitioner was assessed and found unsuitable for mental health treatment. Id. at *6.

On September 6, 2012, Petitioner sought habeas relief in the California Supreme Court (Case No. S205176). (LD 11.)[11] That petition was summarily denied on February 20, 2013. (Pet'r Ex. G, Feb. 20, 2013 Decision of the California Supreme Court (ECF No. 1-8 at 2)). On

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[10] The United States Supreme Court held in North Carolina v. Alford, 400 U.S. 25, 35 (1970), that trial courts "may impose a prison sentence after accepting a plea of nolo contendere, a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty."

[11] Lodged Documents 10 and 11 as submitted be respondent in these proceedings are mistitled. Accordingly, the court has referenced these documents by their content, not their titles.

February 19, 2014, petitioner filed the instant federal habeas petition.[12] (ECF No. 1.)

III. Analysis

A. The "In Custody" Requirement of 28 U.S.C. § 2254(a)

As noted above, respondent first contends that this court is without jurisdiction to hear this matter because petitioner did not meet the "in custody" requirement of the federal habeas statute when he commenced this federal habeas action. Petitioner concedes that when he filed the instant petition, he was not "in custody" as a direct result of his 2002 judgment of conviction which he purports to challenge here, but rather was in custody with respect to his 2011 conviction, the sentence on which was enhanced by his 2002 conviction.

A federal district court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). See also 28 U.S.C. § 2241(c)(3). The "in custody" requirement of § 2254 goes to the court's subject-matter jurisdiction. Maleng v. Cook, 490 U.S. 488, 490 (1989); Williamson v. Gregoire, 151 F.3d 1180, 1182 (9th Cir. 1998).

A habeas corpus petitioner must be "in custody" under the conviction or sentence under attack at the time his petition is filed. Maleng, 490 U.S. at 490-91 (citing Carafas v. LaVallee, 391 U.S. 234, 238 (1968)). "[O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an

[12] On November 27, 2013, the California Court of Appeal for the Third Appellate District, affirmed petitioner's 2011 judgment of conviction and sentence in Placer County Superior Court Case No. 62-84322. See People v. Mills, Case No. C070089, 2013 WL 6185002 (Cal. App. 3d Nov. 27, 2013). In doing so the court acknowledged that, due to the passage of California Proposition 36 while petitioner's appeal was pending, "[i]f defendant had been sentenced today, he would not be subject to a 25-to-life three strikes sentence." Id. at *5. The state appellate court observed that petitioner's "only recourse is to petition for a recall of sentence in the trial court pursuant to Section 1170.126," which authorizes resentencing as a second strike offender if certain conditions are met. Id. at *6. The California Supreme Court denied review on February 11, 2014 (Case No. S215498), stating that "[t]he petition for review is denied without prejudice to any relief to which defendant might be entitled after this court decides People v. Conley, S211275." The issue still pending before the California Supreme Court in Conley is whether California's Three Strikes Reform Act of 2012 applies retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final until after that date.

individual 'in custody' for the purposes of a habeas attack upon it." Maleng, 490 U.S. at 492. The Supreme Court specifically rejected the argument that a habeas petitioner remains "in custody" under a fully expired conviction "merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." Maleng, 490 U.S. at 492. See also Alaimalo v. United States, 645 F.3d 1042, 1060 (9th Cir. 2011) (In Maleng "the Supreme Court held that a defendant who had completed serving his sentence could not obtain habeas corpus relief with respect to that conviction merely because it could possibly be used to enhance his sentence if he committed a subsequent crime, [citation omitted], although it held open the possibility of a challenge to an actual subsequent sentence so enhanced, [citation omitted].") Thus, the "in custody" requirement simply does not extend to a situation where the habeas petitioner suffers no present restraint from the conviction under attack. Maleng, 490 U.S. at 492. Put another way, "once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid." Lackawanna County Dist. Att'y v. Coss, 532 U.S. 394, 403 (2001).

In the present case, petitioner is challenging a 2002 judgment of conviction, the sentence upon which had fully expired, that was relied upon to enhance the sentence on his 2011 judgment of conviction, which sentence petitioner was serving at the time he filed his federal habeas petition. The Supreme Court has also recognized, however, that in such circumstances an application for federal habeas relief may be construed as "asserting a challenge to the [current] sentence, as enhanced by the allegedly invalid prior [] conviction," thereby meeting the "in custody" requirement of the federal statute. Coss, 532 U.S. at 401-02 (citation, internal quotation marks and punctuation omitted).

The Ninth Circuit Court of Appeals has applied the Supreme Court's decision in Coss to hold that the district court has jurisdiction to consider the merits of a habeas petition challenging a conviction upon which the petitioner was "no longer 'in custody.'" Dubrin, 720 F.3d at 1097. In Dubrin, the Ninth Circuit construed the petition at issue as a challenge to the petitioner's 2008 three-strikes sentence "as enhanced" by his 2000 conviction, noting that the latter "was an

essential pillar of the three-strikes sentence he received in 2008." Id. The court concluded that Dubrin was therefore "'in custody' under the 2008 sentence, the constitutionality of which the district court may review under 28 U.S.C. § 2254(a)." Id. (citing Coss, 532 U.S. at 401-02).[13]

Here, the holdings in Coss and Dubrin appear to require that this court liberally construe petitioner's instant petition which purportedly challenges his 2002 conviction, as in fact a challenge to his 2011 judgment and sentence as enhanced by his 2002 conviction. So construed, the instant petition meets the initial foundational "in custody" requirement of 28 U.S.C. § 2254(a). Dubrin, 720 F.3d at 1097; Coss, 532 U.S. at 401-02.

B. Lack of Jurisdiction to Review Petitioner's Fully Expired Conviction

Concluding that in this case petitioner has satisfied the "in custody" requirement of § 2254, however, does not resolve respondent's motion to dismiss the pending petition for lack of subject matter jurisdiction. Notwithstanding the deferential construction of the "in custody" requirement under the decisions in Coss and Dubrin, the Supreme Court has nonetheless narrowly circumscribed the jurisdiction of the federal courts to review challenges to a prior conviction relied on to enhance a subsequent sentence. The Supreme Court has emphasized that the validity of a fully expired conviction may not be challenged simply because it was relied upon to enhance a subsequent sentence:

> [O]nce a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid. If that conviction is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

Coss, 532 U.S. at 403-04 (citation omitted).

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[13] Notably, following remand by the Ninth Circuit in Dubrin, , the petitioner's two federal habeas actions were consolidated in the district court. See Order filed June 9, 2014 in Case No. 10-cv-1032, ECF No. 50 at 4 ("[i]n short, the two cases involve that same parties and challenge the same judgment"). In the instant case, petitioner does not assert, and this court has not identified, a second federal habeas action pursued by petitioner, e.g., challenging his 2011 three-strikes enhanced sentence.

The Supreme Court had earlier recognized one exception to this rule, authorizing federal habeas review of a fully expired prior conviction "where there was a failure to appoint counsel in violation of the Sixth Amendment, as set forth in Gideon v. Wainwright, 372 U.S. 335 (1963)." Coss, 532 U.S. at 404. See also Johnson v. United States, 544 U.S. 295, 303 (2005) ("We recognized only one exception to this rule that collateral attacks were off-limits, and that was for challenges to state convictions allegedly obtained in violation of the right to appointed counsel . . . .") (Citations omitted.) The plurality in Coss recognized the possibility of an additional exception to the rule when petitioner could not be "faulted for failing to obtain timely review of a constitutional claim," for example, if a state court, "without justification, refuse[d] to rule on a constitutional claim that has been properly presented to it;" or when a petitioner obtained "compelling evidence that he is actually innocent of the crime for which he was convicted . . . which he could not have uncovered in a timely manner." Coss, 532 U.S. at 405 (citations omitted).[14]

In Dubrin, the Ninth Circuit acknowledged that, despite its finding that the petitioner in that case was "in custody" for purposes of the federal habeas statute, Coss required "further discussion" of whether the federal habeas court had jurisdiction to review the substance of his petition. Dubrin, 720 F.3d at 1097. The court in Dubrin concluded that the facts in that case were consistent with those theoretically suggested in the Coss plurality opinion, specifically, that federal habeas review of a prior conviction upon which the sentence had expired may still be appropriate "when a defendant, despite exercising reasonable diligence, did not receive a full and fair opportunity to obtain state-court review of his prior conviction." Id. at 1098. In that context, the Ninth Circuit articulated the following exception to the general rule preluding federal habeas review of a conviction for which the sentence was fully expired:

> We . . . hold that when a defendant cannot be faulted for failing to obtain timely review of a constitutional challenge to an expired prior conviction, and that conviction is used to enhance his sentence

[14] In a companion § 2255 case decision issued the same day a four-justice plurality similarly recognized "that there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own." Daniels v. United States, 532 U.S. 374, 383 (2001).

> for a later offense, he may challenge the enhanced sentence under § 2254 on the ground that the prior conviction was unconstitutionally obtained.

Dubrin, 720 F.3d at 1099.

Here, petitioner seeks federal habeas review of his 2002 conviction, which was relied upon to enhance his 2011 sentence, under the exception articulated by the Ninth Circuit in Dubrin.[15] Specifically, petitioner asserts that his 2002 plea and resulting conviction and sentence were unconstitutional; that this unconstitutionality did not become apparent until his counsel's review of petitioner's entire criminal record in 2010; and that petitioner could not previously have discovered this claim because he was proceeding pro se in the interim.

Petitioner's allegations, however, fall far short of establishing the extraordinary circumstances permitting review of a conviction upon which the sentence has expired under Dubrin's narrow exception. In Dubrin, the petitioner had pled no contest in 2000 to a criminal charge after being incorrectly informed by both the prosecutor and the trial judge that the resulting conviction could not subsequently be used as strike for sentencing enhancement purposes. Thereafter, in 2004 and 2005, after learning that the conviction could in fact constitute a strike under California's Three Strikes law, Dubrin sought habeas relief in the state courts. The California Court of Appeal and the California Supreme Court summarily denied relief on the erroneous ground that Dubrin was not then "in custody" on the challenged conviction. Dubrin did not pursue federal habeas relief at that time. Subsequently, pursuant to a new conviction he incurred in 2008, Dubrin's 2000 conviction was relied upon by the sentencing court to impose a Three Strikes sentence upon him. While challenging his 2008 conviction on direct review, Dubrin filed a second round of state habeas petitions challenging his 2000 conviction. Each of those state habeas petitions was summarily denied. In 2010, Dubrin filed his federal habeas petition challenging his 2000 conviction. The district court denied relief. The Ninth Circuit reversed, finding that the state courts had erred in their assessment that petitioner was not "in

[15] Petitioner does not argue that he comes within the exception recognized in Coss. The undersigned notes that petitioner was represented by counsel when he entered his plea in 2002. Nor does petitioner pursue the Coss plurality opinion's exception premised on actual innocence. Although petitioner generally asserts that he was innocent of the charges underlying his 2002 conviction, he does not advance this assertion with any supporting argument or evidence.

custody" in connection with his 2000 conviction when he filed his state habeas petitions in 2004 and 2005, because petitioner was at that time on parole with respect to his 2000 conviction. The Ninth Circuit also found that "Dubrin cannot be faulted for failing to correct the state courts' error by advising them that he was still 'in custody' by virtue of being on parole." Dubrin, 720 F. 3d at 1100. Under these circumstances the Ninth Circuit held that Dubrin was not barred from challenging his 2000 conviction by way of application for federal habeas relief because it would not "serve the interests of law and justice to deprive a state prisoner of what 'may effectively be the first and only forum available for review of the prior conviction.'" Id. at 1099 (citing Coss, 532 U.S. at 406).

The facts of the case now before this court are clearly distinguishable from those confronted by the Ninth Circuit in Dubrin. Here, petitioner relies heavily on his pro se status between 2002 and 2010. However, petitioner's pro se status does not excuse his failure to pursue direct or collateral review of his 2002 conviction before 2010, when his new counsel investigated petitioner's criminal record and filed his first state court habeas petition. It is well established in the statute of limitations context that a prisoner's pro se status and ignorance of the law are not extraordinary circumstances excusing untimely legal challenges. See Raspberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) ("a pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling" in habeas).

Second, despite petitioner's lack of diligence, he ultimately obtained substantive review of his 2002 conviction at each possible level of review by the California courts. In October 2010, the Placer County Superior Court granted petitioner habeas relief and set aside the judgment. In September 2011, the Court of Appeal reversed and remanded with directions to the Superior Court to deny the habeas petition. In February 2013, the California Supreme Court summarily denied review. Unlike the petitioner in Dubrin, in this case petitioner was accorded full substantive review of his claims challenging his 2002 conviction on the merits by the state courts. Under these circumstances, for this court to assume federal habeas jurisdiction at this juncture would not provide the "first and only forum available for review of the prior conviction." Dubrin, 720 F. 3d at 1099. Petitioner has already received collateral review of that judgment conviction

on the merits in state court.

For these reasons, the undersigned finds that the instant petition does not come within the limited exception articulated by the Ninth Circuit in Dubrin for according federal habeas jurisdiction over a conviction upon which the sentence has been fully discharged, despite later reliance on the conviction to enhance the sentence imposed in connection with a subsequent conviction. This case does not present exceptional circumstances justifying the exercise of federal habeas jurisdiction, such as "when a defendant, despite exercising reasonable diligence, did not receive a full and fair opportunity to obtain state-court review of his prior conviction." Dubrin, 720 F. 3d at 1098. Rather, the instant action comes within the general rule reiterated by the Supreme Court in Coss, that "once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available . . . the conviction may be regarded as conclusively valid." Coss, 532 U.S. at 403.

This conclusion is supported by recent district court decisions addressing these issues. Instructive in this regard is the decision in Barroca v. United States, No. CR -94-0470 EMC, 2014 WL 5528063 (N.D. Cal. Oct. 31, 2014). In that case the movant sought to challenge a 1989 state court conviction, the sentence on which had expired, which was relied upon to enhance his current federal sentence. Id. at *1. The district court rejected petitioner's contention that under the decisions in Coss, Daniel and Dubrin, he fell within the exception that allowed him to collaterally challenge his expired state court conviction that had been used to enhance his current federal sentence. In so ruling the district court stated:

> The import of the pluralities' opinions [in Daniels and Coss] and Dubrin was that there might be circumstances where a defendant cannot be faulted for not having obtained timely review of the prior conviction.
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> Here, there is no reason Petitioner could not have filed timely state habeas petitions or direct appeals of his constitutional claims. As the Superior Court noted, there is no explanation for his failure to seek review between 1989 and 2005 (when he first filed a motion to vacate the state court conviction). [citation omitted]. Also, as the Superior Court noted, Petitioner's lack of access to his legal papers and to California state law between 2005 and 2010 due to his incarceration in federal prison are not circumstances that excuse his

> failure to seek review during this period.
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> Here, Petitioner has not presented any "newly discovered evidence" or evidence he "could not have uncovered in a timely manner." Petitioner presents only the evidence that existed at the time of his 1989 conviction, which he could have presented in 1989.
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> Further, not only were channels of review available, Petitioner did in fact obtain review of his prior conviction through his habeas petitions in the state courts, although they were denied.
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> The circumstances here are different from those in Dubrin, where the state courts had "without justification, refuse[d] to rule on a constitutional claim that has been properly presented to [them]." Dubrin, 720 F.3d at 1098. The state courts' refusals to rule on Dubrin's constitutional claims were without justification, since the "justification" was an erroneous understanding of the law that a parolee was not "in custody." Further, Dubrin was misinformed by the judge and prosecutor that his conviction would not count as a strike, so presumably, he believed he had no grounds to seek review. Here, the state courts refused to rule on the merits of Petitioner's constitutional claims, but with justification; by all appearances, they determined that Petitioner failed to demonstrate good cause for delay or actual innocence.
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> Because this is not a case where "no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own," the exceptions suggested by the pluralities in Daniels and Coss, and in Dubrin do not apply. Since there was no Gideon violation under Daniels, Petitioner cannot attack his prior state court conviction in a § 2255 motion even if it was used to enhance his current federal sentence.

2014 WL 5528063, at *5-6. See also Jacob v. Persson, No. 6:12-cv-1680-MA, 2015 WL 268988, *13 (D. Or. Jan. 20, 2015) (concluding that petitioner was barred from obtaining federal habeas review of a challenge to his prior convictions and finding Dubrin inapposite on the ground that "[p]etitioner has not shown that he suffered an unjustified refusal of a state court to rule on his constitutional claim concerning his prior conviction"); Pearce v. Lizarraga, No. 2:13-cv-2321 GGH P, 2014 WL 975391,*2 (E.D. Cal. Mar. 12, 2014) (granting a motion to dismiss petitioner's habeas challenge to a 2001 juvenile commitment which was used to enhance the sentence on his 2006 conviction and finding the decision in Coss inapposite because it allows collateral

challenges to a prior conviction only where there was a failure to appoint counsel, and Dubrin inapposite because it authorizes an exception to Coss only when the state courts' failure to reach the merits of petitioner's challenge to his prior conviction was unjustifiable); Cox v. Montgomery, No. CV 12-7237-JFW (DTB), 2014 WL 462860, at *14 (C.D. Cal. Feb. 5, 2014) (rejecting as facially without merit petitioner's challenge to a 1994 juvenile conviction because petitioner had failed to assert that "the state court, without justification, refused to rule on a properly presented constitutional claim, or that evidence of actual innocence is discovered after the time for review has expired, through no fault of petitioner's" as required by the decisions in Coss and Dubrin.); Patterson v. Trimble, No. 1:11-cv-0032-BAM-HC, 2013 WL 3422481, at *13 (E.D. Cal. July 8, 2013) (rejecting a petitioner's challenge to his 1995 plea and conviction which was relied upon to enhance his current sentence in part because he "had not shown that he suffered an unjustified refusal of a state court to rule on his constitutional claim concerning his prior conviction" as required to qualify for the exception recognized by the Ninth Circuit in Dubrin)

Accordingly, the undersigned concludes that no recognized exception allows consideration of petitioner's challenge to his 2002 state court conviction upon which his sentence long ago expired and that court is without jurisdiction to address the merits of his federal habeas petition pending before the court. Therefore, the undersigned recommends that respondent's motion to dismiss be granted on that basis. In light of this recommendation, the undersigned need not reach respondent's alternate argument that the petition should be dismissed as time-barred under the applicable statute of limitations.

IV. Conclusion

For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

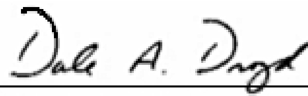
1. Respondent's motion to dismiss (ECF No. 21), be granted; and

2. Petitioner's petition for writ of habeas corpus filed February 19, 2014, be dismissed for lack of subject matter jurisdiction.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days

after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." In his objections, petitioner may address whether a certificate of appealability should issue in the event he files an appeal of the judgment in this case. See 28 U.S.C. 2253(c) (absent a certificate of appealability, an appeal may not be taken from the final decision of a district judge in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255). Any response to the objections shall be served and filed within seven 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. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: February 19, 2015



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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