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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JOSHUA DANIEL MILLS,

No. 2:15-cv-1038-TLN-CMK-P

Petitioner,

vs.

FINDINGS AND RECOMMENDATION

SUZANNE M. PEERY,

Respondent.

_____ /

Petitioner, a state prisoner proceeding with counsel, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondent’s motion to dismiss (Doc. 11). Petitioner filed an opposition to the motion (Doc. 13); Respondent filed a reply brief (Doc. 14). A hearing on the motion to dismiss was held on November 18, 2015, before the undersigned in Redding, California. Deputy Attorney General Henry Valle appeared telephonically on behalf of respondent; attorney Julia Young appeared telephonically on behalf of petitioner.

I. Background

According to the facts alleged in the petition, petitioner was convicted in 2011 of gassing by a prisoner (spitting), resisting an executive officer, and obstructing. On December 16,

1 2011, he was sentenced to 27 to life, as his third strike and based on two priors (including the
2 2002 plea discussed below). Petitioner's conviction was affirmed on direct appeal in 2013, and
3 the California Supreme Court denied review on February 11, 2014. The current petition was
4 filed on May 11, 2015.

5 In addition to the current petition, petitioner filed a previous habeas petition on
6 February 19, 2014, challenging the 2002 plea conviction¹. As related to the prior petition,
7 petitioner entered a no contest plea to the charges of criminal threats and brandishing a weapon.
8 Petitioner did not file a direct appeal to that conviction, but filed a state habeas petition in 2010,
9 which was originally granted by the Placer County Superior Court. However, the habeas grant
10 was reversed on appeal, and the California Court of Appeals directed the trial court to deny the
11 petition. He then filed a petition in the California Supreme Court in 2012, which was denied in
12 2013. Following the California Supreme Court denial, petitioner filed a federal habeas petition
13 in this court in 2014, case number 2:14-cv-0513-WBS-DAD, challenging the 2002 plea. The
14 court construed the petition liberally as a challenge to the 2011 judgement and sentence as
15 enhanced by the 2002 conviction in order to find petitioner met the in custody requirement.
16 However, the petition was denied on the grounds that this court lacked jurisdiction, given that
17 petitioner's allegations failed to establish the extraordinary circumstances required for the court
18 to review a conviction upon which the sentence has expired pursuant to Dubrin v. California, 720
19 F.3d 1095 (9th Cir. 2013).

20 The current petition, filed May 11, 2015 (three months after the denial of the prior
21 petition in this court) raises four grounds for relief: 1) denial of fair trial due to disclosure that
22 petitioner was housed at Pelican Bay; 2) abuse of discretion in refusing to strike a prior; 3) prior
23

24 ¹ The court may take judicial notice pursuant to Federal Rule of Evidence 201 of matters
25 of public record. See U.S. v. 14.02 Acres of Land, 530 F.3d 883, 894 (9th Cir. 2008). Thus, this
26 court may take judicial notice of state court records, see Kasey v. Molybdenum Corp. of
America, 336 F.2d 560, 563 (9th Cir. 1964), as well as its own records, see Chandler v. U.S., 378
F.2d 906, 909 (9th Cir. 1967).

1 strike was unconstitutional; and 4) Sixth and Fourteenth Amendment violations amounted to
2 denial fair trial.

3 **II. Motion to Dismiss**

4 Respondent brings this motion to dismiss on the grounds that this is a
5 second/successive petition filed without prior authorization. Specifically, respondent argues that
6 petitioner’s prior petition filed in 2014 was a challenge to the same conviction and raised the
7 same claim as raised in the current petition. Petitioner counters that the current petition is
8 challenging the 2011 conviction after exhaustion and direct appeal.

9 **III. Discussion**

10 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to
11 dismiss a petition if it “plainly appears from the petition and any attached exhibits that the
12 petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing
13 Section 2254 Cases. The Ninth Circuit has allowed respondents to file a motion to dismiss in
14 lieu of an answer if the motion attacks the pleadings for failing to exhaust state remedies or being
15 in violation of the state’s procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th
16 Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state
17 remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural
18 grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F. Supp.
19 1189, 1194 & n. 12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss
20 after the court orders a response, and the Court should use Rule 4 standards to review the motion.
21 See Hillery, 533 F. Supp. at 1194 & n.12. The petitioner bears the burden of showing that he has
22 exhausted state remedies. See Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).

23 Under 28 U.S.C. § 2244(b)(1), “[a] claim presented in a second or successive
24 habeas corpus application . . . that was presented in a prior application shall be dismissed.”

25 Under § 2244(b)(2), “[a] claim presented in a second or successive habeas corpus application . . .
26 that was not presented in a prior application shall be dismissed. . . .” unless one of two

1 circumstances exist. Either the newly raised claim must rely on a new rule of constitutional law,
2 or the factual predicate of the new claim could not have been discovered earlier through the
3 exercise of due diligence and the new claim, if proven, establishes actual innocence. See id.
4 Before a second or successive petition can be filed in the district court, however, the petitioner
5 must first obtain leave of the Court of Appeals. See 28 U.S.C. § 2244(b)(3). In the absence of
6 proper authorization from the Court of Appeals, the district court lacks jurisdiction to consider a
7 second or successive petition and must dismiss it. See Cooper v. Calderon, 274 F.3d 1270 (9th
8 Cir. 2001) (per curiam).

9 A second petition can only be successive of a prior petition which has been
10 decided on the merits. Woods v. Carey, 525 F.3d 886, 888 (9th Cir. 2008). A decision on the
11 merits occurs if the district court either considers and rejects the claims or determines that the
12 claims will not be considered by a federal court. See Howard v. Lewis, 905 F.2d 1318, 1322-23
13 (9th Cir. 1990). Where a prior petition has been dismissed without prejudice for failure to
14 exhaust state court remedies, the dismissal does not result in an adjudication on the merits
15 because the possibility of returning to court following exhaustion exists and a habeas petition
16 filed in the district court after the initial petition was dismissed is not second or successive. See
17 Slack v. McDaniel, 529 U.S. 473, 485-86 (2000). The dismissal of a petition as untimely,
18 however, does constitute a decision on the merits because such a dismissal is a determination that
19 the claims will not be considered. See McNabb v. Yates, 576 F.3d 1028, 1029-30 (9th Cir.
20 2009). Likewise, the denial of a petition on procedural default grounds is also a determination
21 on the merits. See Henderson v. Lampert, 396 F.3d 1049, 1053 (9th Cir. 2005) (citing Howard,
22 905 F.2d at 1322-23, and stating that the denial of a petition on procedural default grounds is a
23 determination that the claims will not be considered by the federal court).

24 Here, petitioner's first federal habeas petition challenging the constitutionality of
25 his 2002 plea conviction was filed in the state courts in 2010, prior to trial on his latest
26 conviction. That petition was denied by the state courts in 2012, and filed in this court in 2014.

1 The only claim in that petition was the constitutionality of his 2002 plea conviction. While this
2 court construed the petition to be a challenge to the 2011 conviction to the extent that the 2002
3 plea conviction increased the sentence as to the later conviction, there is nothing in the prior
4 petition that directly challenges the 2011 conviction. In addition, looking at the procedural
5 history of the petitions, the challenge to the 2002 plea conviction was initiated in the state courts
6 prior to the trial on the later conviction. In fact, the prior petition was filed just days after the
7 California Supreme Court denied review of the later conviction on direct review. No state
8 habeas petition had even been filed on the 2011 conviction prior to the filing of the prior federal
9 habeas petition.

10 Respondent argues that the current petition should be considered a second or
11 successive petition, and dismissed as filed without Ninth Circuit prior approval. This argument
12 rests on the prior petition being construed as a challenge to the 2011 conviction. Respondent
13 therefore contends that the claims in the current petition either were or should have been included
14 in the prior petition. However, this argument fails to consider that many of the claims raised in
15 the current petition were not exhausted prior to the filing of the prior petition. Therefore, even
16 though the court construed the prior petition as a challenge to the 2011 conviction or sentence, as
17 the other claims raised herein were not exhausted, petitioner could not have included them in the
18 prior petition. Accordingly, with the exception of the third claim challenging the
19 constitutionality of the 2002 plea conviction, the current petition challenging the 2011 conviction
20 is not a second or successive petition.

21 However, to the extent petitioner includes the challenge to the 2002 plea
22 conviction in his current petition, that claim was previously decided by this court in case number
23 2:14-cv-0513-WBS-DAD. The claim presented in the prior petition challenged the 2002 plea on
24 the grounds that there was no factual basis for the plea stated on the record; petitioner's
25 statements in the probation report are not admissions to the charges to which he plead; the plea
26 was not a West or Alford plea; and petitioner was not advised of the direct consequences of his

1 plea. Claim three in the current petition is a challenge to the constitutionality of the 2002 plea
2 conviction on the basis that the plea agreement was violated; and the plea agreement was not
3 entered into freely, voluntarily, or intelligently. The voluntariness of the plea agreement is
4 challenged on the basis that the Boykin/Tahl requirements were not met; there was no factual
5 basis for the plea on the record; the statements in the probation report are not admissions to the
6 charges to which he plead; the plea was not a West or Alford plea; and petitioner was not advised
7 of the direct consequences of his plea. The claims in the two petitions are virtually the same. To
8 the extent there are additional challenges raised in the second petition, the challenges as related
9 to the constitutionality of the 2002 plea conviction could have been raised in the 2014 prior
10 petition. As the claim was denied in the prior petition in a decision considered on the merits,
11 under 28 U.S.C. § 2244(b)(1), it is considered “[a] claim presented in a second or successive
12 habeas corpus application . . . [and] shall be dismissed.”

13 **IV. Conclusion**

14 Claim three in the current petition is a claim presented in a second or successive
15 petition and should be dismissed. However, the other claims in the current petition were not
16 previously presented to the court, nor could they have been properly included in the prior
17 petition. Despite respondents contention, the two petitions challenge separate, albeit somewhat
18 related, convictions. Thus, the current petition as a whole is not a second or successive petition.
19 Petitioner should be allowed the opportunity to challenge the 2011 conviction as those claims
20 have not been addressed. Therefore, the motion to dismiss should be granted in part, but only as
21 to claim three of the petition.

22 Based on the foregoing, the undersigned recommends that:

- 23 1. Respondents’ motion to dismiss (Doc. 11) be granted in part and denied in
24 part;
- 25 2. Claim three, challenging the 2002 plea conviction, presented for the
26 second time, be dismissed;

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3. This action continue as to claims one, two and four of the petition; and

4. Respondent be directed to file a response to the remaining claims in the petition within 30 days

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 20 days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: November 30, 2015



CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE