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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARTHUR ANDERSON,
Petitioner,
v.
STU SHERMAN,
Respondent.

No. 2:16-cv-2530 GGH P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. The court has not ruled on the application to proceed in forma pauperis.

Petitioner is serving a term of nine years to life imprisonment with the possibility of parole. He was convicted on February 4, 1974 for assaulting another prisoner, while he was in prison serving his first, life-term sentence. The only ground raised in the instant petition is denial of representation by a skilled attorney. The relief sought by petitioner is a “Motion for Emergency Release Under Three Judge Court Order of February 10, 2014,” “for California prison inmates (60) years old or older who have served 25 years or more on indeterminate or determinate sentence.”

Review of the petition and attached exhibits, and review of the Inmate Locator Website

1 operated by the California Department of Corrections and Rehabilitation (CDCR),¹ indicates that
2 petitioner is 77 years of age, and has been incarcerated under the authority of the CDCR since
3 1963. Petitioner is currently incarcerated at the California Substance Abuse Treatment Facility in
4 Corcoran. The petition indicates that petitioner’s claim is not exhausted. Review of the
5 California Appellate Court Case Information website² indicates that petitioner has not challenged
6 a matter in the California Court of Appeal or California Supreme Court since 2012. Petitioner
7 requests issuance of an order granting his motion for emergency release based on his advanced
8 age.

9 Federal habeas relief is available “only on the ground that [petitioner] is in custody in
10 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). This
11 “in custody” requirement is jurisdictional and requires that the matter challenged by a federal
12 habeas petition be premised on a claim that petitioner’s “custody offends federal law.” Bailey v.
13 Hill, 599 F.3d 976, 979 (9th Cir. 2010). Rule 4 of the Rules Governing Section 2254 Cases
14 authorizes a district court to dismiss a petition if it “plainly appears from the petition and any
15 attached exhibits that the petitioner is not entitled to relief in the district court.”

16 Petitioner appears to be challenging the refusal of prison authorities to parole petitioner
17 pursuant to California’s “Elderly Prisoner Parole Program.” However, “[t]here is no right under
18 the Federal Constitution to be conditionally released before the expiration of a valid sentence, and
19 the States are under no duty to offer parole to their prisoners.” Swarthout v. Cooke, 562 U.S.
20 216, 220 (2011) (citing Greenholtz v. Inmates of Nebraska, 442 U.S. 1, 7 (1979)). Because
21 petitioner’s challenge does not state a federal habeas claim, this action should be dismissed.
22 Petitioner may direct his papers to the Prison Law Office, at General Delivery, San Quentin CA

24 ¹ See <http://inmatelocator.cdcr.ca.gov/>. This Court may take judicial notice of facts that are
25 capable of accurate determination by sources whose accuracy cannot reasonably be questioned.
26 Fed. R. Evid. 201; see also City of Sausalito v. O’Neill, 386 F.3d 1186, 1224 n.2 (9th Cir. 2004)
27 (“We may take judicial notice of a record of a state agency not subject to reasonable dispute.”).

28 ² See <http://appellatecases.courtinfo.ca.gov/index.html>. 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.

1 94964. See “Information re: Elderly Prisoner Parole,” issued January 2015 by the Prison Law
2 Office, at p. 2 (“If you are an eligible lifer and think the elder parole program is not being fairly
3 applied to you, please write us. We will read your letter and consider whether we can help.”).³

4 Furthermore, to the extent petitioner maintains a claim of ineffective assistance of
5 counsel, it would appear that this claim is unexhausted and time barred.

6 The exhaustion of state court remedies is a prerequisite to the granting of a petition for
7 writ of habeas corpus. 28 U.S.C. § 2254(b)(1). A petitioner satisfies the exhaustion requirement
8 by providing the highest state court with a full and fair opportunity to consider all claims before
9 presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v.
10 Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986). Petitioner’s
11 claim has not been presented to the California Supreme Court. See also 28 U.S.C. § 2244(d)(1)
12 (one year period of limitation shall apply to an application for writ of habeas corpus).

13 Accordingly, IT IS HEREBY ORDERED that the Clerk of Court is directed to randomly
14 assign a district judge to this action.

15 Further, IT IS RECOMMENDED that this action be dismissed without prejudice, see
16 Rule 4, Rules Governing Section 2254 Cases.

17 These findings and recommendations are submitted to the United States District Judge
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
19 after being served with these findings and recommendations, petitioner may file written
20 objections with the court. Such a document should be captioned “Objections to Magistrate
21 Judge’s Findings and Recommendations.” Petitioner is advised that failure to file objections
22 within the specified time may waive the right to appeal the District Court’s order. Martinez v.
23 Ylst, 951 F.2d 1153 (9th Cir. 1991).

24 Dated: November 15, 2016

25 /s/ Gregory G. Hollows
26 UNITED STATES MAGISTRATE JUDGE

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28 ³ See <http://www.prisonlaw.com/research.php>.