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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANCOIS P. GIVENS,
Petitioner,
v.
ROBERT NEUSCHMID,
Respondent.

No. 2:17-cv-0328 KJM CKD P

FINDINGS AND RECOMMENDATIONS

Petitioner is a California prisoner proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. §2254. On November 3, 2020, the district court judge assigned to this case granted respondent’s June 1, 2018 motion to dismiss. In particular, the court held that all claims in petitioner’s February 26, 2018 amended petition for writ of habeas corpus that do not “relate back” to claims in petitioner’s original petition are dismissed as time-barred.

Under Rule 15(c)(1)(B) of the Federal Rules of Civil Procedure, an otherwise untimely claim presented in an amended pleading “relates back to the date of the original pleading when . . . the . . . claim arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.” A claim in an amended petition “does not relate back . . . when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading. . .” Mayle v. Felix, 545 U.S. 644, 650 (2005). Instead, a new claim in an

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1 amended pleading must be tied to a claim asserted in the original by “a common core of operative
2 facts.” Id. at 664.

3 In his original petition, petitioner asserts that his appellate counsel either should not have
4 raised, or should not have been permitted to raise, claims concerning miscalculation of sentence
5 credit and the amount due for a “booking fee.” Instead, petitioner claims his appeal should have
6 proceeded pursuant to People v. Wende, 25 Cal.3d 436, 441–442 (1979) which identifies the
7 process required in California when appellate counsel indicates there are no potentially
8 meritorious claims to raise on appeal.

9 In his amended petition, petitioner’s first 11 claims do not involve petitioner’s appeal.
10 Therefore, the court agrees with respondent that none of those claims “relate back” to the claim
11 presented in petitioner’s original petition and must be dismissed.

12 Generally speaking, petitioner reasserts the claim presented in his original petition in
13 claim 12 of his amended petition and respondent appears to concede that claim 12 at least relates
14 back. However, the court finds that claim 12 is subject to summary dismissal under Rule 4 of the
15 Rules Governing Section 2254 cases, because claim 12 does not provide a basis for habeas corpus
16 relief.

17 On direct appeal, appellate counsel argued that petitioner was entitled to 356 days good
18 conduct sentence credit instead of the 53 days identified by the trial court. Appellate counsel also
19 argued that a “booking fee” identified in the abstract of judgment should be reduced by \$1.00.
20 Error was admitted by The People of the State of California, and relief was granted. Petitioner
21 asserts it was error under California law for counsel to present these claims at the Court of Appeal
22 because the claims were not presented in the Superior Court first. Petitioner asserts the actions of
23 appellate counsel denied plaintiff the process outlined in People v. Wende. Had counsel not
24 raised the sentence credit and booking fee issues, petitioner asserts he would have had the
25 opportunity to file a pro se brief in which he would have raised several issues.

26 The California Supreme Court’s decision in Wende followed the United States Supreme
27 Court’s decision in Anders v. California, 386 U.S. 738 (1967). In that case, the Supreme Court
28 identified certain procedures which must be followed when appellate counsel finds there are no

1 appealable issues. One of the procedures is that the defendant himself be permitted the
2 opportunity to raise issues. Id. at 744.

3 Here, nothing under federal law required that counsel not raise the issues he did on appeal
4 and instead trigger the Wende process. Because a writ of habeas corpus can only be granted for
5 violations of federal law, 28 U.S.C. §2254(a), petitioner’s claim 12 should be summarily
6 dismissed.

7 Accordingly, IT IS HEREBY RECOMMENDED that:

8 1. Claims 1-11 in petitioner’s amended petition for writ of habeas corpus be dismissed as
9 time-barred.

10 2. Claim 12 in petitioner’s amended petition for writ of habeas corpus be summarily
11 dismissed.

12 3. This case be closed.

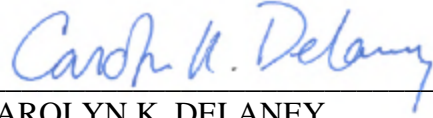
13 These findings and recommendations are submitted to the United States District Judge
14 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
15 after being served with these findings and recommendations, any party may file written
16 objections with the court and serve a copy on all parties. Such a document should be captioned
17 “Objections to Magistrate Judge’s Findings and Recommendations.” In his objections petitioner
18 may address whether a certificate of appealability should issue in the event he files an appeal of
19 the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district
20 court must issue or deny a certificate of appealability when it enters a final order adverse to the
21 applicant). Where, as here, a habeas petition is dismissed on procedural grounds, a certificate of
22 appealability “should issue if the prisoner can show: (1) ‘that jurists of reason would find it
23 debatable whether the district court was correct in its procedural ruling;’ and (2) ‘that jurists of
24 reason would find it debatable whether the petition states a valid claim of the denial of a
25 constitutional right.’” Morris v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000) (quoting Slack v.
26 McDaniel, 529 U.S. 473, 484 (2000)). Any response to the objections shall be served and filed
27 within fourteen days after service of the objections. The parties are advised that failure to file

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1 objections within the specified time may waive the right to appeal the District Court's order.

2 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: November 13, 2020



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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