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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CURTIS KIMBER,)	No. C 08-2062 JSW (PR)
)	
Petitioner,)	ORDER DENYING PETITION
)	FOR A WRIT OF HABEAS CORPUS
vs.)	AND DENYING CERTIFICATE OF
)	APPEALABILITY
)	
ED FOULK, Executive Director, Napa)	
State Hospital,)	
)	
Respondent.)	

INTRODUCTION

This is a habeas case filed pro se by a person presently confined at the Napa State Hospital. The petition is directed to a revocation of probation and the consequent prison sentence imposed on February 22, 2007. This Court ordered Respondent to show cause why a writ should not issue. Respondent filed an answer and a memorandum of points and authorities in support of the answer. He also lodged the record with the court. Petitioner has filed a traverse. For the reasons stated below, the petition is denied on the merits.

BACKGROUND

In 2003 Petitioner pled guilty to a charge of assault by means of force likely to produce great bodily injury and was sentenced to three years of probation. The person who was injured was a “psych tech” at Napa State Hospital. (*See* Ex. B, RT 11/6/03 at 5.) Petitioner apparently was confined there on a mental health conservatorship at the

1 time of the incident. (*Id.* at 7.)

2 On September 28, 2005, the Napa County prosecutor filed a petition to revoke
3 Petitioner's probation. On January 20, 2006, the prosecutor filed another petition to
4 revoke probation, based on a different incident than that which gave rise to the
5 September petition. After a suspension of proceedings for restoration of competency, the
6 two petitions to revoke probation were tried and on January 17, 2007, were sustained.
7 (Ex. B, RT 1/17/09.) On February 22, 2007, Petitioner was sentenced to two years in
8 state prison, with credit for time in custody of 616 days. It is this judgment he attacks
9 here.

10 Petitioner's state habeas petitions in the California Court of Appeal and the
11 California Supreme Court were denied.

12 DISCUSSION

13 A. Standard of Review

14 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified
15 under 28 U.S.C. § 2254, provides "the exclusive vehicle for a habeas petition by a state
16 prisoner in custody pursuant to a state court judgment, even when the Petitioner is not
17 challenging his underlying state court conviction." *White v. Lambert*, 370 F.3d 1002,
18 1009-10 (9th Cir. 2004). Under the AEDPA, this court may entertain a petition for
19 habeas relief on behalf of a California state inmate "only on the ground that he is in
20 custody in violation of the Constitution or laws or treaties of the United States." 28
21 U.S.C. § 2254(a).

22 The writ may not be granted unless the state court's adjudication of any claim on
23 the merits: "(1) resulted in a decision that was contrary to, or involved an unreasonable
24 application of, clearly established Federal law, as determined by the Supreme Court of
25 the United States; or (2) resulted in a decision that was based on an unreasonable
26 determination of the facts in light of the evidence presented in the State court
27 proceeding." *Id.* at § 2254(d). Under this deferential standard, federal habeas relief will
28 not be granted "simply because [this] court concludes in its independent judgment that

1 the relevant state-court decision applied clearly established federal law erroneously or
2 incorrectly. Rather, that application must also be unreasonable.” *Williams v. Taylor*, 529
3 U.S. 362, 411 (2000).

4 While circuit law may provide persuasive authority in determining whether the
5 state court made an unreasonable application of Supreme Court precedent, the only
6 definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the
7 holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court
8 decision. *Id.* at 412; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

9 **B. Evidentiary Hearing**

10 Petitioner asks for an evidentiary hearing in his petition and in his traverse.

11 An evidentiary hearing is held in federal habeas cases only under the most limited
12 circumstances. *Baja v. Ducharme*, 187 F.3d 1075, 1077-79 (9th Cir. 1999). An
13 evidentiary hearing on a claim for which the Petitioner failed to develop a factual basis in
14 state court can be held only if Petitioner shows that: (1) the claim relies either on (a) a
15 new rule of constitutional law that the Supreme Court has made retroactive to cases on
16 collateral review, or (b) a factual predicate that could not have been previously
17 discovered through the exercise of due diligence, and (2) the facts underlying the claim
18 would be sufficient to establish by clear and convincing evidence that but for
19 constitutional error, no reasonable fact finder would have found the applicant guilty of
20 the underlying offense. 28 U.S.C. § 2254(e)(2)(A)-(B). In short, if Petitioner did not
21 attempt to present in state court the facts he wishes to present now, for instance by
22 attempting to develop them in his state habeas proceedings, he cannot do so now unless
23 he can show that he meets the provisions of section 2254(e)(2) outlined above.

24 A prisoner "fails" to develop the factual basis of a claim, triggering § 2254(e)(2),
25 if "there is lack of diligence, or some greater fault, attributable to the prisoner or the
26 prisoner's counsel." *Williams (Michael) v. Taylor*, 529 U.S. 420, 432 (2000). "Diligence
27 will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing
28 in state court in the manner prescribed by state law." *Id.* at 437. Accordingly, where the

1 prisoner has met the burden of showing he was diligent in efforts to develop the facts
2 supporting his claims in state court, an evidentiary hearing may be held without regard to
3 whether the "stringent" requirements of § 2254(e)(2) apply. *Id.* at 437; *Jaramillo v.*
4 *Stewart*, 340 F.3d 877, 882 (9th Cir. 2003); *Jones v. Wood*, 114 F.3d 1002, 1013 (9th
5 Cir. 1997).

6 It is Petitioner's burden to show that he attempted to develop the facts in state
7 court but was prevented from doing so, for instance by showing that the state court
8 denied a request for an evidentiary hearing. *Hutchison v. Bell*, 303 F.3d 720, 747 (6th
9 Cir. 2002) (requiring Petitioner to demonstrate "sufficient diligence"); *Baja*, 187 F.3d at
10 1078-79.

11 Petitioner has not presented any information showing that he acted with due
12 diligence in attempting to develop the facts in state court, whether by requesting an
13 evidentiary hearing in state court or submitting declarations there. He thus has failed to
14 develop facts in state court, and because he has not attempted to show that the exceptions
15 of Section 2254(e)(2)(A)-(B) apply to him, is not entitled to an evidentiary hearing.

16 Furthermore, Petitioner provides only conclusory contentions as to what he
17 expects to show if a hearing were to be held, rather than alleging facts. Thus, even if he
18 had not failed to show that he attempted to develop the facts in state court and was
19 prevented from doing so, he has not shown an entitlement to an evidentiary hearing
20 under the pre-AEDPA standard. *See Williams v. Calderon*, 52 F.3d 1465, 1484 (9th Cir.
21 1995) (to establish right to evidentiary hearing, Petitioner must provide allegations of
22 fact that, if proven, would establish right to relief).

23 The motion for an evidentiary hearing will be denied.

24 **C. Merits**

25 As grounds for habeas relief Petitioner contends: (1) he was the victim of
26 vindictive and selective prosecution; (2) his right to appeal was violated; (3) his lack of
27 mental capacity shows that the prosecution must have been retaliatory; and (4) his
28 appellate counsel was ineffective.

1 **1. Vindictive or Selective Prosecution**

2 Petitioner contends that he was prosecuted because his mother campaigned
3 publically against abuses she perceived in the mental health care system. Because
4 Petitioner is not alleging that the prosecution was motivated by anything he did, as
5 opposed to the actions of someone else, this is not a vindictive prosecution claim, but
6 rather is for selective prosecution. *See Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)
7 (“vindictive prosecution” is when charges are brought to punish the defendant for his or
8 her exercise of a constitutional or statutory right).

9 Petitioner presents nothing but speculative allegations that he was prosecuted
10 because of his mother’s activities. Unsupported allegations of selective prosecution are
11 not enough. *United States v. Davis*, 36 F.3d 1424, 1433 (9th Cir. 1994); *see also United*
12 *States v. Buffington*, 815 F.2d 1292, 1305 (9th Cir. 1987) (speculation of selectivity by
13 black defendant previously acquitted of officer's murder, without additional proof,
14 insufficient to establish selective prosecution). Petitioner’s conclusory allegations are not
15 sufficient to overcome the presumption that the prosecutor properly discharged his or her
16 official duties. *See United States v. Armstrong*, 517 U.S. 456, 463 (1996) (presumption).
17 This claim is without merit.

18 **2. Right to Appeal**

19 Petitioner contends that his due process rights were violated when he was not able
20 to appeal.

21 The Constitution does not require states to grant appeals as of right to criminal
22 defendants seeking to review alleged trial court errors. *Evitts v. Lucey*, 469 U.S. 387, 393
23 (1985) (citation omitted). However, if a state creates a system for appellate review, the
24 procedures must comport with the demands of constitutional due process and equal
25 protection. *Id.*

26 Petitioner says that his mother mailed a timely notice of appeal and request for a
27 certificate of probable cause to the Napa County Superior Court, and when that court
28 failed to file the documents and did not respond, Petitioner’s mother “mailed another

1 notice.” (Pet. at 7.) He asserts that the mailing of these two documents is proved by
2 copies of certified mail receipts provided with his petition. (*Id.*) He says that the superior
3 court forwarded the second notice to the California Court of Appeal, which opened case
4 number A119266 and appointed counsel. When counsel did nothing, Petitioner’s mother
5 petitioned the court of appeal to allow the appeal, but “the petition” was denied without
6 comment. (*Id.*)

7 Petitioner was sentenced to prison in the revocation case on February 22, 2007. He
8 thus had until and including April 23, 2007, to file a notice of appeal with the Superior
9 Court. *See* Cal. R. Ct. 8.308(a) (60 days from entry of judgment to file appeal in criminal
10 case).

11 Petitioner claims that his mother filed a timely notice of appeal, but a review of the
12 attachments to the petition shows that this is a misstatement. The earliest of the certified
13 mail receipts showing mail addressed to the Napa Superior Court carries a mailing date of
14 April 24, 2007. Attached to it is a letter dated April 19, 2007, addressed to the Napa
15 County Superior Court. In it Petitioner’s mother says that she sent a notice of appeal to
16 Petitioner at San Quentin, with instructions for him to sign it and return it to her for filing
17 with the court. She says that she did not receive the receipt back showing that the
18 documents had been received at San Quentin, nor did her son send her the signed notice
19 of appeal. She asks that the court hold her son to less stringent standards than lawyers
20 and that it appoint counsel for him. This does not show that Petitioner (or his mother)
21 mailed a notice of appeal to the Napa County Superior Court within the time to appeal,
22 and contrary to Petitioner’s suggestion, the “mailbox” rule does not apply when, as here,
23 the prisoner has not delivered to prison authorities a document for filing with the court.
24 *See Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003). In her letter dated July
25 16, 2007, Petitioner’s mother describes her letter dated April 19, 2007, as an “inquiry,”
26 which is consistent with its not having been a notice of appeal.

27 Petitioner says in his petition that the superior court forwarded his second notice of
28 appeal to the court of appeals, which opened case number A119266 and appointed

1 counsel. The attachments to the petition show that what Petitioner refers to as the second
2 notice of appeal was a document headed “Petition to Enforce Disabled Person’s Right to
3 Appeal.” The California Court of Appeal treated it as a petition for habeas corpus and
4 denied it. And although it does not seem to have any bearing on this claim, Petitioner has
5 not provided any evidence to support his contention that the court of appeal appointed
6 counsel, no order appointing counsel appears on the docket of that case, and the docket
7 does not show an appearance by any lawyer for Petitioner – it lists him as “pro per.”
8 Nothing in this was a violation of due process.

9 Petitioner has not established that he filed a notice of appeal within the time
10 allowed to do so under California law. His claim that his due process rights were violated
11 with regard to his attempt to appeal is without merit.

12 **3. Mental Capacity**

13 For his third issue, Petitioner states that: “Defense counsel and the trial court
14 acknowledge on the record at sentencing that the doctors who examined me opined that ‘it
15 does not appear that I had the mental facilities [sic] to comply with probation terms,’ and
16 noted that I have brain damage and I should not be sentenced to prison or even tried.”
17 (Pet. at 8.) In his statement of facts supporting the claim he contends that his prosecution
18 was in retaliation for his mother’s activities, a claim dealt with above, and that the
19 prosecution thus violated his due process and equal protection rights. This claim
20 duplicates claim one, above, and is without merit for the reasons discussed there.

21 **4. Ineffective Assistance of Appellate Counsel**

22 Petitioner contends that his appellate counsel was ineffective. There is no
23 evidence that Petitioner had either an appellate case or appellate counsel. The court of
24 appeal treated his “Petition to Enforce Disabled Person’s Right to Appeal” as a petition
25 for habeas corpus and denied it, without appointing counsel. No other case by Petitioner
26 appears on its docket. This claim is without merit.

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28 ///

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 CURTIS KIMBER,
6

7 Plaintiff,

8 v.

9 ED FOULK et al,
10

11 Defendant.
_____ /

Case Number: CV08-02062 JSW

CERTIFICATE OF SERVICE

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
13 Court, Northern District of California.

14 That on December 11, 2009, I SERVED a true and correct copy(ies) of the attached, by placing
15 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
16 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office
17 delivery receptacle located in the Clerk's office.

18 Curtis M. Kimber
19 NA 202929-6
20 C/O Ann P. Williams 2251 Nobili Ave
21 Santa Clara, CA 95051

22 Dated: December 11, 2009

Jennifer Ottolini
23 Richard W. Wieking, Clerk
24 By: Jennifer Ottolini, Deputy Clerk
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