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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH HENRY BROCKETT,
Plaintiff,
v.
STU SHERMAN,
Defendant.

Case No. [17-cv-00984-SI](#)

ORDER ON INITIAL REVIEW
Re: Dkt. No. 1

Joseph Henry Brockett, an inmate at California Substance Abuse Treatment Facility and State Prison in Corcoran, filed this *pro se* action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. His petition is now before the court for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.

BACKGROUND

The petition and attachments thereto provide the following information: Brockett was convicted in San Mateo County Superior Court in 2004 of first degree burglary, petty theft, and two counts of possession of a dangerous weapon (namely, a dirk or dagger). On March 11, 2004, he was sentenced to sixty years to life in prison. Brockett appealed. His conviction was affirmed by the California Court of Appeal and his petition for review was denied in 2005. He also filed unsuccessful petitions for writ of habeas corpus in the California Supreme Court in 2016.

1 removed, if such action prevented petitioner from filing; (3) the constitutional right asserted was
2 recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and
3 made retroactive to cases on collateral review; or (4) the factual predicate of the claim could have
4 been discovered through the exercise of due diligence. *See* 28 U.S.C. § 2244(d)(1). Time during
5 which a properly filed application for state post-conviction or other collateral review is pending is
6 excluded from the one-year time limit. *See id.* § 2244(d)(2).

7 The petition in this action was filed more than a year after petitioner’s conviction became
8 final, and may be untimely under the AEDPA’s one-year limitation period. This apparent
9 procedural problem should be addressed before the court reaches the merits of the claims raised in
10 the petition. If the petition is time-barred, the litigants and court need not expend resources
11 addressing the claims in the petition. Accordingly, pursuant to Rule 4 of the Rules Governing
12 Section 2254 Cases in the United States District Courts, respondent must either (1) move to
13 dismiss the petition on the ground that it is untimely, or (2) inform the court that respondent is of
14 the opinion that a motion to dismiss is unwarranted in this case.

15
16 **CONCLUSION**

17 Good cause appearing therefor,

18 1. The clerk shall serve a copy of this order and the petition upon respondent and
19 respondent’s attorney, the Attorney General of the State of California. The clerk shall also serve a
20 copy of this order on petitioner.

21 2. Respondent must file and serve upon petitioner, on or before **September 8, 2017**, a
22 motion to dismiss the petition or a notice that respondent is of the opinion that a motion to dismiss
23 is unwarranted.

24 3. If petitioner wishes to oppose the motion to dismiss, he must do so by filing an
25 opposition with the court and serving it upon respondent on or before **October 6, 2017**.

26 4. Respondent may file and serve a reply on or before **October 20, 2017**.

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5. The motion will be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion. If respondent notifies the court that a motion to dismiss is unwarranted or the motion to dismiss is decided against respondent, the court will then determine whether to require an answer to the petition.

IT IS SO ORDERED.

Dated: June 26, 2017



SUSAN ILLSTON
United States District Judge