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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNY M. BROWN,
Petitioner,

v.

DAVID BAUGHMAN,
Respondent.

Case No. [17-cv-01409-JCS](#) (PR)

ORDER OF DISMISSAL

INTRODUCTION

Petitioner, who consented to magistrate judge jurisdiction (Dkt. No. 5), seeks federal habeas relief under 28 U.S.C. § 2254. The second amended petition was dismissed for failure to state a claim. The third amended petition, the subject of this order, is here for review under 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases.

The petition will be dismissed because the Court lacks jurisdiction over it; it fails to state a claim for relief; and it is unexhausted.

BACKGROUND

According to the petition, in 1992¹, in the Alameda County Superior Court, petitioner pleaded no contest to a charge of forcible oral copulation, a violation of California Penal Code section 288(a), consequent to which he was sentenced to ten years in state prison. (Third Am. Pet. (“TAP”) at 1-2.)

¹ In his prior petition, petitioner stated that he had been convicted in 2013.

1 (1963) and *Gordon v. Duran*, 895 F.2d 610, 612 (9th Cir. 1990), as is a petitioner on
2 probation, *see Chaker v. Crogan*, 428 F.3d 1215, 1219 (9th Cir. 2005). Custody is found
3 where the sentence imposed significantly restrains petitioner’s liberty, *see, e.g., Dow v.*
4 *Circuit Court*, 995 F.2d 922, 923 (9th Cir. 1993) (sentence of mandatory attendance to
5 fourteen-hour alcohol abuse rehabilitation program sufficient to place petitioner in
6 custody), but not where only a fine is imposed, *see Dremann v. Francis*, 828 F.2d 6, 7 (9th
7 Cir. 1987) (sentence which only imposes fine not enough to satisfy custody requirement
8 even if petitioner faces imprisonment for failure to pay).

9 It is now 2017, 25 years after petitioner’s 10-year sentence was imposed. Petitioner
10 must have served his sentence and therefore he cannot now be in custody for the 1992
11 conviction. This fact deprives the Court of jurisdiction. Because the Court lacks
12 jurisdiction over the petition, it must be dismissed. If petitioner can somehow demonstrate
13 that he is in custody for this offense, he may move to reopen this action.

14 Second, even if the Court had jurisdiction over the petition, it would be dismissed
15 on the separate ground that it fails to state a claim for relief. Petitioner bases his request
16 for relief on his belief that the legislature decriminalized the conduct for which he was
17 convicted. He cites no support for this in his current petition. In a prior petition, he cited
18 *People v. Collins*, 21 Cal. 3d 208 (1978) as support. As the Court stated in its prior order,
19 *Collins* is inapplicable. First, *Collins* discussed the repeal and reinstatement of section
20 288a, the amended version of which decriminalized nonforcible oral copulation,² not
21 section 288(a). *Id.* at 211. Second, *Collins* held that a defendant could not be sentenced if
22 “the conduct which he admitted in pleading guilty was no longer punishable at the time of
23 sentencing.” *Id.* at 212. At the time the defendant in *Collins* was sentenced, the conduct
24 to which he pleaded guilty (oral copulation with allegations of force dismissed) had been
25 decriminalized. Petitioner, in contrast, pleaded no contest to forcible oral copulation,

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27 ² “[T]he Legislature repealed Penal Code section 288a and enacted a new section of the
28 same number which became effective on January 1, 1976. Although forcible oral
copulation is still proscribed under the new section, the act of oral copulation between
consenting, nonprisoner adults is not.” *Collins*, 21 Cal. 3d at 211.

1 which was punishable at the time of sentencing. The petition, then, fails to state a claim
2 for relief. If petitioner files an amended petition, not only must he show that the Court has
3 jurisdiction, he must also state a claim for relief.

4 Third, petitioner's claim is unexhausted. He admits that his appeal of the superior
5 court's denial is pending. (TAP at 4.) Prisoners in state custody who wish to challenge
6 collaterally in federal habeas proceedings either the fact or length of their confinement are
7 first required to exhaust state judicial remedies, either on direct appeal or through collateral
8 proceedings, by presenting the highest state court available with a fair opportunity to rule
9 on the merits of each and every claim they seek to raise in federal court. *See* 28 U.S.C.
10 § 2254(b), (c); *Rose v. Lundy*, 455 U.S. 509, 515-516 (1982).

11 Because his appeal is pending and he has not given the state supreme court an
12 opportunity to rule on the merits of his claim, the petition is unexhausted. To reopen this
13 action, petitioner must file an amended petition that (1) shows that the Court has
14 jurisdiction over the petition; (2) states a claim for relief; and (3) shows he has exhausted
15 his claim (or that he is entitled to file and then move to stay a protective petition).

16 **CONCLUSION**

17 The petition is **DISMISSED** without prejudice. Because this dismissal is without
18 prejudice, petitioner may move to reopen the action. Any motion to reopen must contain
19 an amended petition that addresses the issues of jurisdiction, stating a claim, and
20 exhaustion.

21 The Clerk shall enter judgment in favor of respondent, and close the file.

22 **IT IS SO ORDERED.**

23 **Dated:** July 25, 2017

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26 JOSEPH C. SPERO
27 Chief Magistrate Judge
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNY M. BROWN,
Plaintiff,
v.
DAVID BAUGHMAN,
Defendant.

Case No. [17-cv-01409-JCS](#)

CERTIFICATE OF SERVICE

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

That on July 25, 2017, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Kenny M. Brown ID: V22473
CMC-East Facility (Cell # 5134)
P.O. Box 8101
San Luis Obispo, CA 93409-8101

Dated: July 25, 2017

Susan Y. Soong
Clerk, United States District Court

By: Karen L. Hom
Karen Hom, Deputy Clerk to the
Honorable JOSEPH C. SPERO