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# UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

KENNY M. BROWN,

Petitioner,

v.

DAVID BAUGHMAN,

Respondent.

Case No. <u>17-cv-01409-JCS</u> (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 1992<sup>1</sup>, 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.)

<sup>&</sup>lt;sup>1</sup> In his prior petition, petitioner stated that he had been convicted in 2013.

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In 2015 and 2017, petitioner sought but was denied relief in the state superior court. His appeal of that denial is pending. (*Id.* at 3-4.)

### DISCUSSION

#### I. Standard of Review

This Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A district court considering an application for a writ of habeas corpus shall "award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in the petition are vague or conclusory, palpably incredible, or patently frivolous or false. See Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990).

#### II. **Grounds for Relief**

As grounds for federal habeas relief, petitioner claims that the state legislature "decriminalized" the conduct for which he was convicted. (TAP at 3.)

There are at least three reasons to dismiss the petition.

First, the Court lacks jurisdiction over the petition because petitioner is no longer in custody for the conviction he is challenging. The federal writ of habeas corpus is only available to persons "in custody" at the time the petition is filed. See 28 U.S.C. §§ 2241(c), 2254(a); Carafas v. LaVallee, 391 U.S. 234, 238 (1968). This requirement is jurisdictional. Id. A petitioner who files a habeas petition after he has fully served his sentence and who is not subject to court supervision is not "in custody" for the purposes of this Court's subject matter jurisdiction and his petition is therefore properly denied. See De Long v. Hennessey, 912 F.2d 1144, 1146 (9th Cir. 1990).

The custody requirement does not mandate that a prisoner be physically confined. Maleng v. Cook, 490 U.S. 488, 491 (1989). A petitioner who is on parole at the time of filing is considered to be in custody, see Jones v. Cunningham, 371 U.S. 236, 241–43

Northern District of California

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

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

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

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<sup>&</sup>lt;sup>2</sup> "[T]he Legislature repealed Penal Code section 288a and enacted a new section of the 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.

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

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

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

### **CONCLUSION**

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

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

IT IS SO ORDERED.

**Dated:** July 25, 2017

JOSEPH C. SPERO Chief Magistrate Judge

# 1 2 3 UNITED STATES DISTRICT COURT 4 NORTHERN DISTRICT OF CALIFORNIA 5 6 KENNY M. BROWN, 7 Case No. 17-cv-01409-JCS Plaintiff, 8 v. **CERTIFICATE OF SERVICE** 9 DAVID BAUGHMAN, 10 Defendant. 11 12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California. 13 That on July 25, 2017, I SERVED a true and correct copy(ies) of the attached, by placing 14 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 15 receptacle located in the Clerk's office. 16 17 Kenny M. Brown ID: V22473 CMC-East Facility (Cell # 5134) 18 P.O. Box 8101 San Luis Obispo, CA 93409-8101 19 20 21 Dated: July 25, 2017 22 Susan Y. Soong 23 Clerk, United States District Court 24 25 Karen Hom, Deputy Clerk to the Honorable JOSEPH C. SPERO 26 27