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28UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY SMITH,
Petitioner,
v.
SPEARMAN,
Respondent.

Case No. [20-cv-00322-SI](#)**ORDER DENYING MOTION TO
DISMISS AND SETTING BRIEFING
SCHEDULE**

Dkt. No. 8

Anthony Smith filed this action for writ of habeas corpus to challenge a 2009 burglary conviction he suffered in Alameda County Superior Court. Respondent has moved to dismiss the petition for failure to comply with the habeas statute of limitations. The motion will be denied without prejudice because respondent has not adequately demonstrated that a 2nd amended abstract of judgment does not affect the timeliness of the federal petition.

Smith was sentenced on January 8, 2010. See Docket No. 8-2 at 10. On appeal, the California Court of Appeal remanded for the trial court to either strike or impose a term for Smith's fourth prior conviction, and affirmed in all other respects. Docket No. 8-1 at 8-9. On December 5, 2011, the trial court struck the fourth prior conviction and filed an amended abstract of judgment. Docket No. 8-4 at 3, 4. A "2nd amended abstract" of judgment was filed on January 4, 2019, that was essentially the same as the earlier amended abstract of judgment except that it added that the defendant was sentenced under "PC 667.6(c)(21)" in addition to being sentenced (as had been reported in the amended abstract) under "PC 667(b)-(i) or 1170.12." Docket No. 9-6 at 2 (item 8).

There is a one-year statute of limitations for filing a federal petition for writ of habeas corpus. See 28 U.S.C. § 2244(d). It appears that Smith's federal petition filed less than one year after that 2nd amended abstract was filed would be timely if that 2nd amended abstract is considered a new

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1 judgment, but likely would not be timely if the 2nd amended abstract is not considered a new
2 judgment (because the limitations period would have commenced in or about 2011 rather than in
3 2019). See *Smith v. Williams*, 871 F.3d 684, 687 (9th Cir. 2017).

4 Respondent urges that the 2nd amended abstract did not constitute a new judgment because
5 it was merely the correction of a clerical omission in the original abstract. Respondent appears
6 correct on the law: the issuance of an amended abstract of judgment to correct a scrivener's error
7 does not change the underlying judgment and therefore does not constitute a new judgment. See
8 *Gonzalez v. Sherman*, 873 F.3d 763, 772 (9th Cir. 2017). However, respondent has not made an
9 adequate record to demonstrate that the 2nd amended abstract was, in fact, merely a correction of a
10 clerical error. For example, the record does not include the original sentencing transcript, any court
11 minutes from January 4, 2019, or even any letters from the CDCR requesting a correction of the
12 amended abstract of judgment – any of which might support the view that the 2nd amended abstract
13 was prepared just to correct an error in an earlier abstract. Without any documentation showing
14 why the 2nd amended abstract was issued, this court cannot conclude that it was merely a correction
15 of a clerical omission such that it did not amount to a new judgment.

16 There also is a question whether the 2nd amended abstract can be viewed as merely a
17 correction of a clerical omission if it was itself erroneous. The 2nd amended abstract states that
18 Smith was sentenced under California Penal Code section 667.6(c)(21), but the court has not found
19 such a subsection.¹ The applicability of section 667.6 at all appears dubious because it concerns sex
20 offenses whereas Smith's conviction was for a burglary. If California Penal Code section
21 667.6(c)(21) exists, respondent should attach a copy of it to any new motion to dismiss. If the
22 subsection does not exist, respondent should explain in any new motion to dismiss how and when
23 the error will be fixed. Lastly, if the 2nd amended abstract cites to a subsection that was not
24 mentioned in the oral pronouncement of sentence in 2010, the parties should discuss whether that
25 2nd amended abstract can be considered the correction of a scrivener's error that does not change
26 the underlying judgment and therefore does not constitute a new judgment under *Gonzalez*. The

27 _____
28 ¹ There is a California Penal Code section 667.5(c)(21), but that is not the section mentioned in the
2nd amended abstract.

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parties are encouraged to cite any relevant case authority on this point.

For the foregoing reasons, respondent’s motion to dismiss is DENIED. Docket No. 8. Respondent has not demonstrated that the 2nd amended abstract is not a new judgment for purposes of determining the timeliness of the federal petition for writ of habeas corpus. The denial of the motion to dismiss is without prejudice to respondent filing a new motion to dismiss if he is able to demonstrate that the 2nd amended abstract should not be viewed as a new judgment for purposes of the statute of limitations.

The court now sets the following new briefing schedule: Respondent must file and serve a motion to dismiss the petition or an answer to the petition on or before **January 15, 2021**. Petitioner must file and serve his opposition to a motion to dismiss or his traverse on or before **February 19, 2021**. Respondent may file and serve a reply in support of any motion to dismiss on or before **March 5, 2021**.

IT IS SO ORDERED.

Dated: November 17, 2020



SUSAN ILLSTON
United States District Judge