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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BENJAMIN D. RODRIGUEZ,)	Civil No. 08cv856 LAB(RBB)
)	
Petitioner,)	REPORT AND RECOMMENDATION RE:
)	GRANTING RESPONDENT'S MOTION
v.)	TO DISMISS [DOC. NO. 13]
)	
HERNANDEZ, Warden,)	
)	
Respondent.)	
_____)	

Petitioner Benjamin Rodriguez, a prisoner proceeding pro se, filed his Petition for Writ of Habeas Corpus [doc. no. 1] on May 12, 2008, his First Amended Petition [doc. no. 7] on July 28, 2008, and his Second Amended Petition [doc. no. 11] on October 23, 2008, pursuant to 28 U.S.C. § 2254. Petitioner claims he is entitled to habeas relief because (1) the judge abused his discretion in sentencing; (2) the nine strikes included in his sentence violated the Eighth Amendment; (3) his sentence violated the Fourteenth Amendment; and (4) because his sentence was improper, there was a fundamental breach of courtroom administration that violated the Sixth Amendment. (Pet. 5-7.)

1 On December 15, 2008, Respondent filed a Motion to Dismiss
2 [doc. no. 13] with a Memorandum of Points and Authorities and
3 exhibits. Respondent alleges that the Petition must be dismissed
4 because it is procedurally defaulted. (Mot. Dismiss Attach. # 1
5 Mem. P. & A. 3.) Petitioner has not filed an opposition. Although
6 local rule 7.1(f)(3)(c) provides that failure to oppose a motion
7 may constitute consent to it, this Court will evaluate the merits
8 of the Motion to Dismiss. S.D. Cal. Civ. L.R. 7.1(f)(3)(c).

9 I. FACTUAL BACKGROUND

10 On February 23, 2006, Petitioner was charged with thirty-five
11 counts of committing a lewd act upon a child, including allegations
12 of substantial sexual conduct and one-strike sentencing. (Mot.
13 Dismiss Attach. # 1 Mem. P. & A. 1-2, Ex. A at 1-17.) Rodriguez
14 entered into an agreement on December 1, 2006, to plead guilty to
15 nine counts of committing a lewd act upon a child with substantial
16 sexual conduct; he acknowledged a sentencing range of eighteen to
17 twenty-four years; and he waived his right to appeal his sentence.
18 (Id. at Mem. P. & A. 2, Ex. A at 18-20.) On May 3, 2007, Rodriguez
19 was sentenced to twenty years of imprisonment with nine strikes
20 placed on his record. (Second Am. Pet. 1-2; Mot. Dismiss Attach.
21 #1 Mem. P. & A., Ex. A at 24.)

22 II. PROCEDURAL BACKGROUND

23 On September 5, 2008, sixteen months after he was sentenced,
24 Rodriguez filed a notice of appeal with the Superior Court of
25 California, County of San Diego. (Second Am. Pet. 15.) Because a
26 notice of appeal must be filed within sixty days of judgment, his
27 notice was untimely. (Id.) The Clerk of the Superior Court sent
28 Petitioner a letter dated September 9, 2008, explaining that his

1 appeal was late and directing him to contact Appellate Defenders,
2 Inc. if he had any questions. (Id.) He requested assistance from
3 Appellate Defenders, Inc. to file a late notice of appeal, but
4 Rodriguez was informed on March 12, 2008, that it would not pursue
5 his case. (Id. at 13.) Petitioner wrote to the California Supreme
6 Court, and on September 10, 2008, the Clerk of the Court sent a
7 reply letter to Rodriguez advising him that the court could not
8 provide legal assistance. (Id.)

9 Rodriguez filed his first federal Petition for Writ of Habeas
10 Corpus on November 21, 2007, which was dismissed for failure to pay
11 the filing fee and failure to allege exhaustion of state judicial
12 remedies. Rodriguez v. Hernandez, Case No. 07cv2230 J (LSP), slip
13 op. (S.D. Cal. Dec. 14, 2007). He filed a Petition and Amended
14 Petition in the pending case, on May 12 and July 28, 2008,
15 respectively, both of which were dismissed without prejudice for
16 failure to allege exhaustion of state judicial remedies [doc. nos.
17 1, 2, 7, 8]. On October 23, 2008, Rodriguez filed a Second Amended
18 Petition that alleged he pursued a direct appeal and collateral
19 review in the state courts. (Second Am. Pet. 2-5.) He attached
20 the following documents to his Petition: (1) a September 9, 2008,
21 letter from the Superior Court of California, County of San Diego,
22 (2) a March 12, 2008, letter from the Appellate Defenders, Inc.,
23 and (3) a September 10, 2008, letter from the Clerk of the Supreme
24 Court of California. (Id. at 13-15.)

25 III. STANDARD OF REVIEW

26 Because Rodriguez filed his Petition after April 24, 1996, it
27 is subject to the Antiterrorism and Effective Death Penalty Act
28

1 (AEDPA) of 1996. 28 U.S.C.A. § 2244 (West Supp. 2008). AEDPA sets
2 forth the scope of review for federal habeas corpus claims:

3 The Supreme Court, a Justice thereof, a circuit
4 judge, or a district court shall entertain an application
5 for a writ of habeas corpus in behalf of a person in
6 custody pursuant to the judgment of a State court only on
7 the ground that he is in custody in violation of the
8 Constitution or laws or treaties of the United States.

9 28 U.S.C.A. § 2254(a) (West 2006); see also Hernandez v. Ylst, 930
10 F.2d 714, 719 (9th Cir. 1991).

11 To present a cognizable federal habeas corpus claim, a state
12 prisoner must allege that his conviction was obtained "in violation
13 of the Constitution or laws or treaties of the United States." See
14 28 U.S.C.A. § 2254(a) (West 2006). Petitioner must allege that the
15 state court violated his federal constitutional rights. See Reed
16 v. Farley, 512 U.S. 339, 347 (1994); Hernandez, 930 F.2d at 719;
17 Jackson v. Ylst, 921 F.2d 882, 885 (9th Cir. 1990).

18 In 1996, Congress "worked substantial changes to the law of
19 habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.
20 1997) (abrogated on other grounds by Williams v. Taylor, 529 U.S.
21 362 (2000)). Amended § 2254(d) now reads:

22 An application for a writ of habeas corpus on behalf
23 of a person in custody pursuant to the judgment of a
24 State court shall not be granted with respect to any
25 claim that was adjudicated on the merits in State court
26 proceedings unless the adjudication of the claim --

27 (1) resulted in a decision that was
28 contrary to, or involved an unreasonable
29 application of, clearly established Federal
30 law, as determined by the Supreme Court of the
31 United States; or

32 (2) resulted in a decision that was based
33 on an unreasonable determination of the facts
34 in light of the evidence presented in the State
35 court proceeding.

1 28 U.S.C.A. § 2254(d) (West 2006).

2 **IV. DISCUSSION**

3 Respondent argues the Second Amended Petition should be
4 dismissed with prejudice because the claims are procedurally
5 defaulted. (Mot. Dismiss Attach. #1 Mem. P. & A. 3, 5-6.)

6 **A. Whether Rodriguez's Claims are Procedurally Barred**

7 Under the procedural default doctrine, a federal court "will
8 not review a question of federal law decided by a state court if
9 the decision of that court rests on a state law ground that is
10 independent of the federal question and adequate to support the
11 judgment.'" Calderon v. U.S. Dist. Ct. (Bean), 96 F.3d 1126, 1129
12 (9th Cir. 1996) (quoting Coleman v. Thompson, 501 U.S. 722, 729
13 (1991)); see also Hill v. Roe, 321 F.3d 787, 789 (9th Cir. 2003);
14 LaCrosse v. Kernan, 244 F.3d 702, 704 (9th Cir. 2001); Park v.
15 California, 202 F.3d 1146, 1151 (9th Cir. 2000). Where a federal
16 habeas petitioner could have raised a constitutional claim in state
17 court but failed to do so and is now barred by a state rule of
18 procedure, the petition has been procedurally defaulted. Tacho v.
19 Martinez, 862 F.2d 1376, 1378 (9th Cir. 1988) (citing Murray v.
20 Carrier, 477 U.S. 478, 485 (1986)).

21 Federal habeas review of that claim is precluded unless the
22 petitioner "can demonstrate cause for the default and prejudice as
23 a result of the alleged violation of federal law, or demonstrate
24 that failure to consider the claim[] will result in a fundamental
25 miscarriage of justice." Coleman, 501 U.S. at 750; see also High
26 v. Ignacio, 408 F.3d 585, 590 (9th Cir. 2005) (citing Coleman, 501
27 U.S. at 750); Franklin v. Johnson, 290 F.3d 1223, 1230-31 (9th Cir.
28 1992).

1 A respondent has the burden of pleading an adequate and
2 independent procedural bar as an affirmative defense. Bennett v.
3 Mueller, 322 F.3d 573, 585 (9th Cir. 2003). The burden of proof
4 then shifts to the petitioner to place that defense in issue, for
5 example, by asserting factual allegations demonstrating the
6 inadequacy of the state procedure, including citations to case
7 authority that show an inconsistent application of the state rule.
8 Id. at 586. If the factual allegations are made, the burden shifts
9 back to the respondent to demonstrate the bar is applicable. Id.

10 Respondent Hernandez argues that as part of the plea
11 agreement, Rodriguez waived his right to appeal or challenge his
12 sentence, and failed to obtain a certificate of probable cause.
13 (Mot. Dismiss Attach. #1 Mem. P. & A. 3, 5.) Petitioner also did
14 not properly exhaust his claims by presenting them to every level
15 of California courts. (Id. at 4-5.)

16 1. Independence of the Rule

17 "For a state procedural rule to be 'independent,' the state
18 law basis for the decision must not be interwoven with federal
19 law." LaCrosse, 244 F.3d at 704 (citing Michigan v. Long, 463 U.S.
20 1032, 1040-41 (1989)); see also Park, 202 F.3d at 1152. "'A state
21 law ground is so interwoven if the state has made application of
22 the procedural bar depend on an antecedent ruling on federal law
23 [such as] the determination of whether federal constitutional error
24 has been committed.'" Bennett, 322 F.3d at 581 (quoting Park, 202
25 F.3d at 1152).

26 The California Penal Code provides that a prisoner may not
27 appeal a judgment based on a guilty plea unless the person "has
28 filed with the trial court a written statement . . . showing

1 reasonable constitutional, jurisdictional, or other grounds going
2 to the legality of the proceedings[,]” and “[t]he trial court has
3 executed and filed a certificate of probable cause for such appeal
4” Cal. Penal Code § 1237.5 (West Supp. 2009). The
5 California Rules of Court add that the notice of appeal “must be
6 filed within 60 days after the rendition of the judgment or the
7 making of the order being appealed. Except [where there is a
8 public emergency], no court may extend the time to file a notice of
9 appeal.” Cal. R. Ct. 8.308(a) (West 2009) (formerly Rule 30.1(a)).

10 All direct appeals from a guilty plea require a timely request
11 for a certificate of probable cause. People v. Mendez, 19 Cal. 4th
12 1084, 1088-89, 969 P.2d 146, 148-49, 81 Cal. Rptr. 2d 301, 304
13 (1999). Although a notice of appeal must be filed with the clerk
14 of court, a prisoner may satisfy this requirement by showing that
15 the notice was delivered to prison authorities within the time
16 allowed. In re Jordan, 4 Cal. 4th 116, 130, 840 P.2d 983, 992, 13
17 Cal. Rptr. 2d 878, 887 (1992). Unless covered by an exception,
18 where a defendant fails to fully and timely comply with the
19 certificate of probable cause requirements, the appellate court is
20 deprived of jurisdiction to determine the merits of the case.
21 People v. Way, 113 Cal. App. 4th 733, 736, 6 Cal. Rptr. 3d 644, 646
22 (Ct. App. 2003) (citations omitted); see In re Chavez, 30 Cal. 4th
23 643, 651, 68 P.3d 347, 352, 134 Cal. Rptr. 2d 54, 60 (2003); People
24 v. Panizzon, 13 Cal. 4th 68, 76, 913 P.2d 1061, 1065, 51 Cal. Rptr.
25 2d 851, 856 (1996).

26 An appeal that is not based on the validity of a guilty plea
27 is not subject to the certificate of probable cause requirements of
28 California Penal Code section 1237.5. People v. Corban, 138 Cal.

1 App. 4th 1111, 1116, 42 Cal. Rptr. 3d 184, 188 (Ct. App. 2006)
2 (stating that if the defendant's challenge to his sentence is
3 essentially a challenge of the validity of a guilty plea, the
4 appeal is subject to section 1237.5). Where a particular sentence
5 is part of a plea agreement, a challenge to the validity of the
6 sentence is viewed as a challenge to the plea itself and is subject
7 to section 1237.5. People v. Panizzon, 13 Cal. 4th at 79, 913 P.2d
8 at 1068, 51 Cal. Rptr. 2d at 858. Even where the plea agreement
9 specifies a maximum sentence, it "inherently" reserves the parties'
10 right to a sentencing proceeding, so an appellant need not obtain a
11 certificate of probable cause to challenge the sentence. People v.
12 Buttram, 30 Cal. 4th 773, 777, 69 P.3d 420, 422, 134 Cal. Rptr. 2d
13 571, 573 (2003) (citing People v. Cole, 88 Cal. App. 4th 850, 106
14 Cal. Rptr. 2d 174 (Ct. App. 2001)).

15 Failure to obtain a certificate of probable cause is an
16 independent and adequate state ground for finding a procedural
17 default. Strong v. Sullivan, 2008 WL 205299, at **1 (9th Cir. Jan.
18 23, 2008); see also Mitchell v. Superior Ct., 632 F.2d 767, 773
19 (9th Cir. 2980) (stating that California Penal Code § 1237.5
20 governs the right to appeal after a guilty plea in state court);
21 Delgado v. Lewis, 223 F.3d 976, 980 (9th Cir. 2000) (explaining
22 that a probable cause certificate is a state "prerequisite" to
23 filing an appeal from a guilty plea).

24 Here, Rodriguez pleaded guilty pursuant to a plea agreement
25 which specified a sentencing range of eighteen to twenty-four years
26 imprisonment; he also waived his right to appeal his sentence.
27 (Mot. Dismiss Attach. #1 Mem. P & A. Ex. A at 18-19.) Petitioner's
28 plea agreement did not reserve the right to challenge his sentence.

1 (Id. at Ex. A at 19.) On May 3, 2007, the trial judge sentenced
2 Petitioner to twenty years' imprisonment, which was in the range
3 set forth in the plea agreement. (Id. at Ex. A at 21-24; Second
4 Am. Pet. 1.) Rodriguez would have needed to file a notice of
5 appeal with the superior court no later than sixty days after May
6 3, 2007. He did not. Petitioner filed his notice of appeal over a
7 year later, on September 5, 2008. (Second Am. Pet. 15.) His
8 notice of appeal was "Received but not filed" with "no further
9 action to be taken" because it was "untimely." (Id.) The decision
10 in Rodriguez's case was based on independent state procedural
11 grounds. Bennett, 322 F.3d at 581.

12 2. Adequacy of the Rule

13 A state procedural rule is "adequate" when the rule is "firmly
14 established and regularly followed" at the time of the default.
15 Anderson v. Calderon, 232 F.3d 1053, 1077 (9th Cir. 2000)
16 (citations and quotations omitted) overruled in part on other
17 grounds by Bittaker v. Woodford, 331 F.3d 715, 728 (9th Cir. 2003);
18 see also Bennett, 322 F.3d at 583 (citing Poland v. Stewart, 169
19 F.3d 573, 577 (9th Cir. 1999)). The state procedural rule must
20 also be clear, well-established, and consistently applied. Wells
21 v. Maass, 28 F.3d 1005, 1010 (9th Cir. 1994) (citations omitted).
22 To determine whether a procedural rule has been consistently
23 applied, the court must look at both published and unpublished
24 state cases decided at the time of the purported default. Powell
25 v. Lambert, 357 F.3d 871, 879 (9th Cir. 2004).

26 Respondent has met his initial burden under Bennett by
27 pleading procedural default as an affirmative defense. (Mot.
28 Dismiss Attach. #1 Mem. P. & A. 3-4); see Bennett, 322 F.3d at 586.

1 The burden then shifts to Rodriguez to place the defense in issue.
2 Bennett, 322 F.3d at 586. Ordinarily, a habeas petitioner fulfills
3 his burden under Bennett by asserting "specific factual allegations
4 that demonstrate the inadequacy of the state procedure," including
5 case citations demonstrating inconsistent application of the rule.
6 Id. As of this date, Rodriguez has not filed an opposition to the
7 Respondent's Motion to Dismiss, but Petitioner attached three
8 letters to his Second Amended Petition that demonstrate his efforts
9 to appeal his sentence and exhaust his state remedies. (Id. at 2-
10 5, 13-15.)

11 Rodriguez submitted a notice of appeal on September 5, 2008,
12 well beyond sixty days from the May 3, 2007, judgment. (Id. at
13 15.) In a letter dated September 9, 2008, the Clerk of the
14 Superior Court informed Petitioner that his notice of appeal was
15 received but not filed because it was untimely. (Id.) Rodriguez
16 alleges that this September 9, 2008, letter served as collateral
17 review in the California Superior Court. (Id. at 3.)

18 On February 1, 2008, Petitioner requested assistance from
19 Appellate Defenders, Inc. to file a late notice of appeal. (Id. at
20 13.) Appellate Defenders, Inc. informed Rodriguez, in a letter
21 dated March 12, 2008, that it was unable to help him file a late
22 notice of appeal. (Id.) Petitioner alleges that letter served as
23 his direct appeal to the California Court of Appeal. (Id. at 2.)

24 Then, on August 18, 2008, Rodriguez wrote to the Supreme Court
25 of California. (Id. at 14.) The Clerk of the Supreme Court
26 replied on September 10, 2008, and informed him that the court
27 could not provide legal assistance. (Id.) Petitioner alleges that
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1 this letter satisfied his direct review and collateral review in
2 the state's highest court. (Id. at 2, 4.)

3 The evidence that Rodriguez relies on, the three letters
4 described above, do not present "specific factual allegations"
5 showing the state procedure to be inadequate or inconsistently
6 applied. Bennett, 322 F.3d at 586. Thus, Petitioner has not
7 carried his burden. Furthermore, the Ninth Circuit has held that
8 the failure to comply with California Penal Code § 1237.5 is an
9 independent and adequate state procedural bar. Strong v. Sullivan,
10 No. 06-55956, 2008 WL 205299, at **1. Rodriguez has defaulted
11 state court review of the federal claims he attempts to raise in
12 his habeas Petition.

13 3. Cause and Prejudice

14 For the Court to review the merits of defaulted claims,
15 Petitioner must demonstrate cause and prejudice:

16 In all cases in which a state prisoner has defaulted his
17 federal claims in state court pursuant to an independent
18 and adequate state procedural rule, federal habeas review
19 of the claims is barred unless the prisoner can
20 demonstrate cause for the default and actual prejudice as
a result of the alleged violation of federal law, or
demonstrate that failure to consider the claims will
result in a fundamental miscarriage of justice.

21 Coleman, 501 U.S. at 750; see also Edwards v. Carpenter, 529 U.S.
22 446, 451 (2000).

23 Petitioner has not submitted any evidence explaining the cause
24 for his late notice to appeal and establishing that actual prejudice
25 will result from the alleged constitutional violation. Nor has he
26 demonstrated that failure to consider his claims will result in a
27 fundamental miscarriage of justice. Rodriguez has not met his
28 burden of proof, and the Court is barred from considering his

1 Petition. See Coleman, 501 U.S. at 750. In Coleman, the Court
2 explained the rationale underlying the procedural default doctrine.

3 [A] habeas petitioner who has failed to meet the State's
4 procedural requirements for presenting his federal claims
5 has deprived the state courts of an opportunity to address
6 those claims in the first instance. A habeas petitioner
7 who has defaulted his federal claims in state court meets
8 the technical requirements for exhaustion; there are no
state remedies any longer "available" to him. . . . The
independent and adequate state ground doctrine ensures
that the States' interest in correcting their own mistakes
is respected in all federal habeas cases.

9 Id. at 732.

10 For the reasons set forth above, the Court should grant
11 Respondent's Motion to Dismiss. Petitioner's claims have been
12 defaulted by an independent and adequate state procedural rule --
13 the failure to obtain a certificate of probable cause. Rodriguez
14 has not shown cause and prejudice for the default or that a
15 fundamental miscarriage of justice will result.

16 **4. Failure to Properly Present His Claims**

17 Petitioner makes no other allegations that he sought any post-
18 conviction relief in the California state courts. Rodriguez was
19 required to exhaust state judicial remedies, either on direct appeal
20 or through collateral proceedings, by presenting his claims to the
21 highest California court and providing it with a full and fair
22 opportunity to rule on their merits. See 28 U.S.C. § 2254(b), (c);
23 O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (explaining that
24 "state prisoners must give the state courts one full opportunity to
25 resolve any constitutional issues by invoking one complete round of
26 the State's established appellate review process[]"); Rose v. Lundy,
27 455 U.S. 509, 515-16 (1982) (abrogated on other grounds by Rhines v.
28 Weber, 544 U.S. 269 (2005)). He needed to "present[] his federal

1 claim[s] to the appropriate state courts (plural) in the manner
2 required by the state courts" Casey v. Moore, 386 F.3d 896,
3 915-16 (9th Cir. 2004) (citation omitted).

4 As a separate procedural default, Respondent argues that
5 Rodriguez failed to raise his claims with the California Supreme
6 Court. (Mot. Dismiss Attach. #1 Mem. P. & A. 4.) In Gatlin v.
7 Madding, 189 F.3d 882, 888 (9th Cir. 1999), the court explained,
8 "Because California's 'established, normal appellate review
9 procedure is a two-tiered system,' (citing Sullivan v. Boerckel, 526
10 US. at 845), [the petitioner] was required to exhaust his habeas
11 claims in a petition for review to the California Supreme Court."
12 Although Rodriguez wrote to the California Supreme Court on
13 September 10, 2008, he did not properly present his claim to that
14 Court. (Compare Pet. 14, with Cal. R. Ct. 8.500(a), (c), 8.508
15 (2009).)

16 A procedural default occurs either when (1) the petitioner
17 presented his claim to the state courts, which ruled
18 against the petitioner on adequate and independent state-
19 law procedural grounds; or (2) the petitioner failed to
20 present the claim to the state courts, and "it is clear
21 that those courts would now hold the claim procedurally
22 barred."

23 United States ex rel. Rico v. Hinsley, No. 04C5081, 2007 U.S. Dist.
24 LEXIS 56244, at *13 (N.D. Ill. Aug. 1, 2007) (citing Coleman v.
25 Thompson, 501 U.S. at 735 n.1). For this separate reason,
26 Rodriguez's claims are procedurally defaulted and may not be
27 considered here. Because Petitioner has failed to properly present
28 his claims for post-conviction relief to the California Courts,
other than the untimely notice of appeal, he has procedurally
defaulted the claims. O'Sullivan v. Boerckel, 526 U.S. at 848.

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V. CONCLUSION

Respondent's Motion to Dismiss the Second Amended Petition for Writ of Habeas Corpus [doc. no. 13] should be **GRANTED**.

This Report and Recommendation will be submitted to the United States District Court judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file written objections with the Court and serve a copy on all parties on or before April 30, 2009. The document should be captioned "Objections to Report and Recommendation." Any reply to the objections shall be served and filed on or before May 18, 2009. The parties are advised that failure to file objections within the specified time may waive the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).

Dated: March 20, 2009


RUBEN B. BROOKS
United States Magistrate Judge

cc: Judge Burns
All parties of record