Swain v. Beard et al Doc. 6

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Oct 22 2013
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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

11 THEODORE SWAIN,

Petitioner,

ORDER:

Civil No.

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JAMES BEARD, Secretary, et al.,

V.

(1) GRANTING MOTION TO WITHDRAW NOTICE OF APPEAL;

13cv1849-WQH (RBB)

(2) DISMISSING FIRST AMENDED PETITION WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND; and

and,

(3) DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

Respondents.

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On August 8, 2013, Petitioner, a state prisoner proceeding pro se, filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis. On August 22, 2013, the Court granted Petitioner's in forma pauperis application and dismissed the Petition because Petitioner challenged only the imposition of a restitution fine, and had therefore failed to invoke this Court's habeas jurisdiction. Petitioner was instructed that in order to proceed with this action he was required to file a First Amended Petition on or before October 11, 2013.

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On September 10, 2013, Petitioner filed a Notice of Appeal of this Court's August 8, 2013, Order. On October 5, 2013, Petitioner constructively filed a First Amended Petition and

a Motion to withdraw the Notice of Appeal. The Court **GRANTS** Petitioner's Motion to withdraw his notice of appeal, which was in any case ineffective because it was premature as a final judgement had not been entered. See Serine v. Peterson, 989 F.3d 371, 372-73 (9th Cir. 1993) (holding that premature notice of appeal was not cured by subsequent entry of final judgment).

The First Amended Petition incorporates the original Petition and is not complete in and of itself without reference to the superseded pleading, and is therefore subject to dismissal. See S. D. Cal. Civle 15.1. Furthermore, rather than curing the defects of pleading identified in the Court's previous Order of dismissal, the First Amended Petition merely contains argument that this Court was incorrect in dismissing the original Petition for lack of jurisdiction on the basis that the original Petition challenged only a restitution hearing. (FAP at 2-5.) This Court is bound by Ninth Circuit authority, which was cited in the Court's previous Order of dismissal, and which provides that the Court lacks jurisdiction over this action. See Bailey v. Hill, 599 F.3d 976, 982 (9th Cir. 2010) ("§ 2254 does not confer jurisdiction over a state prisoner's incustody challenge to a restitution order imposed as part of a criminal sentence.")

In the instant case, Petitioner is challenging a May 14, 2013, restitution hearing arising from his March 4, 2008, conviction in San Diego County Superior Court case number SCD199072. Petitioner is currently challenging that same conviction in a habeas action pending in this Court in Civil Case No. 11cv1086-H (PCL). But for the fact that the Court lacks jurisdiction over the instant Petition, and but for the fact that it would appear to be futile for Petitioner to seek leave in Civil Case No. 11cv1086-H (PCL) to present the restitution claim presented here, the Court would have instructed the Clerk of Court to file the original Petition in this case as a motion to amend the petition in Civil Case No. 11cv1086-H (PCL). See Woods v. Carey, 525 F.3d 886 (9th Cir. 2008) (stating that a new pro se petition challenging the same conviction as a pending petition, which is filed before the first petition is adjudicated, should be liberally construed as an attempt to amend the pending petition rather than summarily dismissed as second or successive).

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Because it is now clear that Petitioner does not wish to cure the defect of pleading identified in the Court's previous Order of dismissal, but seeks to challenge binding Ninth Circuit authority which provides that this Court lacks jurisdiction to entertain a challenge to his restitution hearing, and because Petitioner currently has pending in this Court a habeas action challenging the conviction underlying the restitution order he challenges in this case, the Court **DISMISSES** this action without further leave to amend. The dismissal is without prejudice to Petitioner attempting to seek leave to present his restitution claim in Civil Case No. 11cv1086-H (PCL), although such an attempt appears futile.

CONCLUSION AND ORDER

The Court **GRANTS** Petitioner's Motion to Withdraw his premature Notice of Appeal, and **DISMISSES** this action without prejudice and without further leave to amend. The Court **DECLINES** to issue a Certificate of Appealability and **DIRECTS** the Clerk of Court to enter final judgment accordingly. If Petitioner wishes to appeal the dismissal of this action he must timely file a new Notice of Appeal.

United States District Judge

DATED: /0/22//3 William Q. Hayes

Copies to: ALL PARTIES