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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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WILLIAM CATO SELLS, JR.,

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Petitioner,

3:14-cv-00361-LRH-VPC

11

vs.

ORDER

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NEVADA STATE BOARD OF PAROLE,
et al.,

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Respondents.

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This habeas matter under 28 U.S.C. § 2254 comes before the Court for a decision on the merits.

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In the sole ground presented, petitioner alleges that his exposure to a parole revocation hearing in Nevada constituted exposure to a second parole violation proceeding based on the same underlying parole violations in violation of the Double Jeopardy Clause.

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Background

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Petitioner William Cato Sells, Jr., was convicted in 1994 in Nevada of multiple offenses and sentenced as a habitual criminal to, *inter alia*, two concurrent sentences of life with the possibility of parole. He thereafter was paroled on July 7, 2009, to supervision by the State of Washington pursuant to an interstate compact.

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Petitioner alleges in the federal petition that he was arrested by Washington authorities on July 18, 2010, for, *inter alia*, second degree identity theft and second degree possession of stolen property.¹

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¹ECF No. 5, at 1.

1 On or about July 29, 2010, Washington authorities sent a violation report to Nevada authorities.
2 Nevada authorities responded that same date on a form designated as a "Response to Violation Report."

3 The following responses on the form were marked by an "x" in a box:

4 This acknowledges receipt of your violation report dated: 07/29/2010

5 Continue supervision and notify upon disposition of pending charges.

6 Continue supervision and apply any appropriate sanctions.

7 Other (explain*)

8 *Explanation: Nevada is in the process of submitting a Violation Report
9 to the Parole Board and requesting Mr. Sells' parole be rescinded.
10 Please keep your case active until such a time as the Division is in
11 receipt of the Parole Board's Order (NV) and warrant. Please continue
12 to advise on the status of his new charges. Please feel free to contact me
13 directly at . . . with questions or information. Thank you.

12 See ECF No. 5, at 14.

13 Twelve days later, on August 10, 2010, a proceeding was held at the Grays Harbor County Jail
14 in Washington. The hearing officer found Sells guilty on allegations based on identity theft, possession
15 of stolen property, possession of burglary tools, and burglary. The hearing officer dismissed a
16 marijuana use allegation "as there was no condition to not use drugs." The hearing officer
17 recommended the following:

18 Recommend a warrant be issued by Nevada for the return
19 of Mr. Sells for a parole revocation hearing. I recommend that he be
20 held in confinement pending a decision by Nevada. If Mr. Sells is not
21 returned I recommend a 90 day sanction.

21 ECF No. 5, at 16-17.

22 Less than 60 days later, on September 30, 2010, Nevada authorities issued a retake warrant
23 seeking to have Sells returned to Nevada for violating his parole conditions.²

24 Sells apparently was convicted and incarcerated in Washington thereafter on the underlying
25 criminal offenses that occurred in Washington.

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28 ²ECF No. 5, at 19.

1 On August 13, 2012, while incarcerated in Washington State Prison in Walla Walla, Sells filed
2 a petition for a writ of prohibition in Nevada state district court. He alleged that the August 10, 2010,
3 proceeding had constituted a “parole violation proceeding” and that double jeopardy barred Nevada
4 authorities from conducting a second proceeding. ECF No. 7-3.

5 The state district court denied relief on, *inter alia*, the following basis:

6 First, double jeopardy does not apply to parole revocation
7 proceedings. *Moor v. Palmer*, 603 F.3d 568, 660 (9th Cir. 2010), *quoting*
8 *Hudson v. United States*, 522 U.S. 93, 98-99 (1997); *Dunn v. California*
9 *Dep’t of Corrections*, 401 F.2d 340, 342 (9th Cir. 1968).

10 Second, Sells fails to demonstrate that any action taken by the
11 WDOC violated double jeopardy. [Nevada] Parole and Probation’s
12 pending administrative hearing to revoke Sells’ parole is based solely
13 upon Sells’ two life sentences, the grant of parole in 2009, and his illegal
14 actions which lead to the new Washington conviction. No action taken
15 by WDOC regarding disciplinary action has any impact on Sells’
16 continuation of his Nevada life sentences.

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18 ECF No. 7-6.

19 On appeal, the Supreme Court of Nevada affirmed, on the following basis:

20 Double Jeopardy protections . . . are not implicated here
21 because the purpose of the parole revocation hearing at issue in this case
22 is to determine whether the Parole Board will reinstate appellant’s
23 original sentence for the underlying crime due to his apparent parole
24 violations, not to punish the appellant for the conduct that led to the parole
25 revocation hearing. *See United States v. Brown*, 59 F.3d 102, 104-05 (9th
26 Cir. 1995) (recognizing that the revocation of parole is viewed as the
27 reinstatement of a previous sentence, not as punishment for the actions
28 resulting in the revocation). This is true even if the parolee is subjected
to more than one parole revocation based on the same underlying act, as
appellant alleges is the case here. *See United States v. Clark*, 984 F.2d
319, 320 (9th Cir. 1993) (holding that the revocation of both probation
and supervised release related to two prior convictions based on a single
action by the offending party was permissible and did not implicate
double jeopardy). Accordingly, we conclude that the district court did
not abuse its discretion in denying appellant’s petition for a writ of
prohibition

ECF No. 7-8.

29 In the federal petition, Sells alleges that the Double Jeopardy Clause bars Nevada from
30 conducting a parole revocation hearing. He maintains that “[d]ue to the fact [that] Nevada authorities
31 authorized the Washington State Department of Corrections to conduct petitioner’s parole violation
32 hearing and impose sanctions thereon, [they] forfeited there [sic] right to conduct a ‘second’ parole

1 violation hearing and impose additional sanctions.” ECF No. 5, at 3.

2 It appears that, subsequent to the filing of the federal petition, Sells has been released by
3 Washington into the custody of Nevada authorities. He currently is incarcerated in Nevada, apparently
4 following upon the revocation of his parole, there having been no court order to the contrary.

5 ***Standard of Review***

6 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a “highly deferential”
7 standard for evaluating state-court rulings that is “difficult to meet” and “which demands that state-court
8 decisions be given the benefit of the doubt.” *Cullen v. Pinholster*, 563 U.S. 170 (2011). Under this
9 highly deferential standard of review, a federal court may not grant habeas relief merely because it
10 might conclude that the state court decision was incorrect. 563 U.S. at 202. Instead, under 28 U.S.C.
11 § 2254(d), the court may grant relief only if the state court decision: (1) was either contrary to or
12 involved an unreasonable application of clearly established law as determined by the United States
13 Supreme Court; or (2) was based on an unreasonable determination of the facts in light of the evidence
14 presented at the state court proceeding. 563 U.S. at 181-88.³

15 A state court decision is “contrary to” law clearly established by the Supreme Court only if it
16 applies a rule that contradicts the governing law set forth in Supreme Court case law or if the decision
17 confronts a set of facts that are materially indistinguishable from a Supreme Court decision and
18 nevertheless arrives at a different result. *E.g., Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003). A state
19 court decision is not contrary to established federal law merely because it does not cite the Supreme
20 Court’s opinions. *Id.* Indeed, the Supreme Court has held that a state court need not even be aware of
21 its precedents, so long as neither the reasoning nor the result of its decision contradicts them. *Id.*
22 Moreover, “[a] federal court may not overrule a state court for simply holding a view different from its
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24 ³28 U.S.C. § 2254(d) requires that, if the foregoing standard is not met, “[a]n application for a writ of habeas
25 corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any
26 claim that was adjudicated on the merits.” Petitioner is and has been in custody pursuant to the judgment of a state
27 court, both while on parole and now while in physical custody. The AEDPA standard of review accordingly applies
28 even though he does not challenge the underlying judgment of conviction. *Accord Himes v. Thompson*, 336 F.3d 848
(9th Cir. 2003)(applying AEDPA standard of review to challenge to decisions revoking parole and denying rerelease);
cf. Shelby v. Bartlett, 391 F.3d 1061, 1064-65 (9th Cir. 2004)(AEDPA limitation period applied to claims by a person in
custody pursuant to a state court judgment regardless of the target of the claim).

1 own, when the precedent from [the Supreme] Court is, at best, ambiguous.” 540 U.S. at 16. For, at
2 bottom, a decision that does not conflict with the reasoning or holdings of Supreme Court precedent is
3 not contrary to clearly established federal law.

4 A state court decision constitutes an “unreasonable application” of clearly established federal
5 law only if it is demonstrated that the state court’s application of Supreme Court precedent to the facts
6 of the case was not only incorrect but “objectively unreasonable.” *E.g., Mitchell*, 540 U.S. at 18; *Davis*
7 *v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004).

8 To the extent that the state court’s factual findings are challenged, the “unreasonable
9 determination of fact” clause of Section 2254(d)(2) controls on federal habeas review. *E.g., Lambert*
10 *v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires that the federal courts “must be
11 particularly deferential” to state court factual determinations. *Id.* The governing standard is not
12 satisfied by a showing merely that the state court finding was “clearly erroneous.” 393 F.3d at 973.

13 Rather, AEDPA requires substantially more deference:

14 [I]n concluding that a state-court finding is unsupported by
15 substantial evidence in the state-court record, it is not enough that we
16 would reverse in similar circumstances if this were an appeal from a
17 district court decision. Rather, we must be convinced that an appellate
panel, applying the normal standards of appellate review, could not
reasonably conclude that the finding is supported by the record.

18 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at 972.

19 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be correct unless
20 rebutted by clear and convincing evidence.

21 The petitioner bears the burden of proving by a preponderance of the evidence that he is entitled
22 to habeas relief. *Pinholster*, 563 U.S. at 569.

23 ***Discussion***

24 At the outset, petitioner’s moving factual premise is undercut by the administrative materials
25 that he presents.

26 Sells maintains that Nevada authorities authorized Washington authorities to conduct his “parole
27 violation hearing” and thereby forfeited their right to conduct a second “parole violation hearing.” The
28 administrative materials that he attaches with his pleadings instead clearly reflect that: (a) Nevada

1 authorities indicated from the outset on July 29, 2010, that the matter was being presented to the Nevada
2 Parole Board for consideration of parole revocation proceedings and Nevada authorities made no
3 request to Washington authorities that they determine whether his Nevada parole should be revoked;
4 (b) the hearing officer at the August 10, 2010, Washington hearing clearly had no issue before him, and
5 made no determination, regarding petitioner’s Nevada parole, instead recommending that he be returned
6 to Nevada for a parole revocation hearing; and (c) Nevada authorities issued a retake warrant only a
7 short time later on September 30, 2010. In short, a parole *revocation* hearing – a hearing to determine
8 whether petitioner’s Nevada parole should be revoked – never was held in Washington. Nor did
9 Nevada authorities ever cede, forfeit, or relinquish their authority to conduct a parole revocation hearing
10 over to Washington authorities.

11 In any event, regardless of the character of the August 10, 2010, Washington proceedings,
12 petitioner cannot carry his burden under the deferential AEDPA standard of review.

13 In *Clark v. United States*, 984 F.2d 319 (9th Cir. 1993), the Ninth Circuit held that the Double
14 Jeopardy Clause did not bar the revocation of probation in one case and of supervised release in another
15 with imposition of consecutive sentences based upon the same violation. The appeals court stated:

16 Clark misunderstands the distinction between prosecution for an
17 offense and revocation of probation or release in a previously-imposed
18 sentence. In his district court cases, Clark had been previously convicted
19 and sentenced for two separate offenses: theft and aiding and abetting in
20 No. 90–439–K, and escape in No. 91–659–R. Accordingly, when he
21 violated the terms of his supervised release and probation, respectively,
22 he subjected himself to deferred punishment for those two crimes. He
23 was not directly prosecuted for the violation at all. Although the
24 violating act underlying revocation was the same in both cases, the
25 punishment was for the conduct underlying the original convictions. This
26 does not implicate double jeopardy. *Cf. [United States v.] Redd*, 759
27 F.2d [699,] . . . 701 [(9th Cir. 1985)]; *Bible [v. Arizona]*, 449 F.2d [111,]
28 . . . 112 [(9th Cir. 1971)].

984 F.2d at 321.

24 Petitioner urges that the Supreme Court of Nevada misapplied *Clark* because in *Clark* the same
25 violation resulted in revocations as to two separate convictions. In contrast, he maintains that he has
26 been serving and/or been on parole on only one (relevant) sentence on only one Nevada conviction as
27 to which he has had a “violation hearing” twice in violation of double jeopardy.

28 Petitioner misapprehends his burden under AEDPA.

1 Petitioner must show that the state court decision was contrary to or an objectively unreasonable
2 application of clearly established federal law *as determined by the United States Supreme Court*.
3 Attempting to show instead that a state court allegedly misapplied federal circuit precedent does not
4 satisfy that burden. Petitioner cites no Supreme Court precedent holding that the Double Jeopardy
5 Clause even has any application to parole revocation proceedings in the first instance, much less that
6 it bars two “violation hearings” held by agencies of two different states in the manner suggested by
7 petitioner. Nor has the Court found any such Supreme Court precedent on independent review.⁴ Absent
8 such precedent, petitioner’s claim fails.

9 The petition for a writ of habeas corpus therefore will be denied on the merits.⁵

11 ⁴*Cf. Johnson v. United States*, 529 U.S. 694, 700-01 (2000)(the Court attributed post-revocation penalties to
12 the original conviction rather than to punishment for the violation of the conditions of supervised release in light of, *inter*
13 *alia*, the double jeopardy issues that instead would arise if the post-revocation penalties were construed as punishment
14 for the violation); *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980)(“there is no double jeopardy protection
15 against revocation of probation and the imposition of imprisonment”); *see also Moor v. Palmer*, 603 F.3d 658, 660 (9th
16 Cir. 2010)(parole revocation simply is a continuation of the punishment for the original crime and is not a criminal
17 penalty for violation of the terms of parole; parole revocation therefore is not a type of criminal punishment that would
18 trigger the protections of the Double Jeopardy Clause).

19 The only procedural vehicle by which petitioner could have sought to have such law established by a federal
20 court in the first instance for his case would have been via a timely petition to the United States Supreme Court for a writ
21 of *certiorari* from the May 14, 2014, decision of the Supreme Court of Nevada.

22 ⁵The Court is not persuaded that it should resolve the case on different grounds.

23 Respondents contended in their answer, which was filed while petitioner still was incarcerated in Washington,
24 that his double jeopardy claim was not ripe because petitioner’s parole had not yet been revoked. The Court is not
25 sanguine that a double jeopardy claim seeking to forestall an allegedly successive proceeding is not ripe until after the
26 conclusion of the successive proceeding. The Double Jeopardy Clause, after all, protects against successive proceedings
27 where it is applicable. Under respondents’ argument, a defendant would not be able to stop a second trial for the same
28 offense under the Double Jeopardy Clause but instead would have to wait until the conclusion of the second trial and
appeal. In any event, respondents’ ripeness concern, to the extent that it presented a viable issue, would appear to have
been resolved by the apparent subsequent revocation of petitioner’s parole and his reincarceration in Nevada.

 The flip side of ripeness is accrual and timeliness. On or about March 30, 2012, the Nevada Division of Parole
and Probation transmitted papers to Sells seeking his waiver of extradition and waiver of personal revocation hearing
preparatory to holding a parole revocation hearing. See ECF No. 8, at 5-6. Petitioner filed his August 13, 2012, state
petition within five months of this date. He further constructively filed his July 7, 2014, original federal petition within a
month of the June 9, 2014, issuance of the remittitur following the state supreme court’s affirmance of the denial of state
judicial relief. While these dates would suggest that the federal petition potentially was timely, a question potentially
would arise as to whether petitioner’s claim accrued as far back as petitioner’s notice of the September 30, 2010, retake
warrant. Respondents have not raised any issue as to timeliness, however. The Court is neither obligated nor inclined to

(continued...)

1 IT THEREFORE IS ORDERED that the petition is DENIED on the merits and that this action
2 shall be DISMISSED with prejudice.⁶

3 IT FURTHER IS ORDERED that a certificate of appealability is DENIED. For the reasons
4 assigned herein, reasonable jurists would not find the district court's rejection of the sole ground
5 presented herein to be debatable or wrong.

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7 ⁵(...continued)

8 raise the issue *sua sponte* at this late juncture, particularly given the factual inquiry required to determine when Sells
9 reasonably knew what with regard to Nevada's intentions. *See Wood v. Milyard*, 132 S.Ct. 1826, 1830 & 1832-35
10 (2012)(a federal court is not obligated to consider a forfeited timeliness defense *sua sponte* and potentially may abuse its
11 discretion by doing so); *cf. Shelby v. Bartlett*, 391 F.3d 1061, 1065-66 (9th Cir. 2004)(accrual of habeas corpus claims
12 pertaining to administrative action turns upon when the petitioner has notice). The scheduling order in this action
13 required that respondents "raise all potential affirmative defenses in the initial responsive pleading." ECF No. 4, at 1-2.
14 Their boilerplate in the answer that "[r]espondents assert all relevant defense [sic] including defenses this Court can
15 raise *sua sponte*" preserved nothing. *See* ECF No. 7, at 3.

16 Respondents suggested in the answer that the petition should be dismissed – at a time when petitioner was in
17 physical custody in Washington – because "there is no named respondent who has custody over SELLS' person that can
18 produce him." ECF No. 7, at 9. As a Nevada parolee, petitioner undeniably was in custody for purposes of the habeas
19 jurisdiction of a Nevada federal court with regard to the subject matter of this habeas claim, especially following the
20 September 30, 2010, retake warrant. *See, e.g., Rose v. Morris*, 619 F.3d 42 (9th Cir. 1980). Petitioner further properly
21 named the Nevada Board of Parole and Nevada Attorney General as respondents on such a claim. *See, e.g., Jones v.*
22 *Cunningham*, 371 U.S. 236, 243-44 (1963); 1976 Advisory Committee Notes to Rule 2(b) of the Rules Governing
23 Section 2254 Cases (parole officials are proper respondents if petitioner is a parolee, and the state attorney general is the
24 proper catchall respondent in all other anomalous situations that differ from those covered in the advisory committee
25 note). Now that petitioner is back in Nevada physical custody, it perhaps would be appropriate for petitioner to add his
26 immediate physical custodian, the Warden at High Desert State Prison, as an additional respondent. However, the action
27 was properly commenced against proper respondents; and the current absence of the immediate custodian as an
28 additional respondent does not go to the Court's jurisdiction over the subject matter, particularly given the nature of that
subject matter. *See Rumsfeld v. Padilla*, 542 U.S. 426, 451-52 (2004)(Kennedy, J., concurring); *see also Armentero v.*
INS, 340 F.3d 1058 (9th Cir. 2003), *opinion withdrawn on grant of en banc rehearing*, 382 F.3d 1153 (9th Cir. 2004),
appeal dismissed per fugitive disentitlement doctrine, 412 F.3d 1088 (9th Cir. 2005)(the Ninth Circuit extensively
discussed a "flexible, practical approach to designating appropriate respondents"). Petitioner may, however, file a
motion in this court to add the Warden as an additional respondent if he wishes to do while seeking appellate or other
review. *Cf.* 1976 Advisory Committee Notes, *supra* ("In any of the above situations the judge may require or allow the
petitioner to join an additional or different party as a respondent if to do so would serve the ends of justice.") There
nonetheless is no impediment to proceeding to final judgment with the original and properly named respondents.

24 Respondents' further provided argument regarding whether petitioner was provided sufficient procedural due
25 process. Petitioner raised only a single claim under the Double Jeopardy Clause. The Court has no other claim before
it.

26 The overriding point in all events is that petitioner cannot carry his burden under AEDPA on his double
27 jeopardy claim.

28 ⁶The docketing clerk is requested and directed to review the final disposition paragraph of this order pertaining
to petitioner's identification number prior to commencing docketing and service of the order and judgment.


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IT FURTHER IS ORDERED that petitioner may file a motion in this court to add his immediate physical custodian as a respondent in conjunction with any request for appellate or other review.

IT FURTHER IS ORDERED that, prior to docketing and service of this order and the accompanying judgment, the Clerk of Court shall correct petitioner's identification – or “back” – number on the docket sheet to 42483 rather than 42485, so that the notice of electronic filing issued during docketing will reflect mail service on petitioner with the correct identification number in petitioner's address.

The Clerk shall enter final judgment accordingly in favor of respondents and against petitioner, dismissing this action with prejudice.

DATED this 14th day of July, 2017.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE