

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APR 23 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PETER WILSON,

Petitioner-Appellant,

v.

DANIEL PARAMO, Warden,

Respondent-Appellee.

No. 18-15384

D.C. No. 5:16-cv-01127-EJD
Northern District of California,
San Jose

ORDER

Before: McKEOWN and N.R. SMITH, Circuit Judges.

The district court entered its judgment on July 8, 2016. Although appellant did not file his notice of appeal until March 7, 2018, the attachments to that notice of appeal – which include a prison mail log – demonstrate that he originally mailed his request for a certificate of appealability to this court on July 15, 2016. With the benefit of the prison mailbox rule, appellant’s notice of appeal was timely filed within 30 days from entry of the district court’s judgment. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1), (c), (d); *Tinsley v. Borg*, 895 F.2d 520, 523 (9th Cir. 1990).

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2);

Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

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10 PETER WILSON,
11 Petitioner,
12 v.
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14 WARDEN,
15 Respondent.

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28 Case No. 16-01127 EJD (PR)

**ORDER OF DISMISSAL;
GRANTING MOTION FOR LEAVE
TO PROCEED *IN FORMA
PAUPERIS***

(Docket Nos. 2 and 7)

Petitioner, a California prisoner, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his state conviction. Petitioner has filed a motion for leave to proceed in forma pauperis. (Docket Nos. 2 & 7.)

DISCUSSION

A second or successive petition containing previously raised or new claims may not be filed in the district court unless the petitioner first obtains from the United States Court of Appeals an order authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3)(A).

It appears that the instant habeas petition is second or successive because Petitioner filed a prior habeas petition in this district, see Wilson v. Campbell, Case No. 06-2242

1 JSW (PR), which challenged the same state conviction out of Santa Clara County in 2000.
2 In that case, the Court dismissed the petition as untimely.¹ Section 2244 applies when the
3 previous petition was dismissed as barred by the statute of limitations which constitutes a
4 disposition on the merits. McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009); Murray
5 v. Greiner, 394 F.3d 78, 81 (2d Cir. 2005).

6 In addition to raising numerous federal claims, the petition begins with an argument
7 that Petitioner's original petition was timely based on statutory tolling under § 2244(d)(2).
8 (Pet. at 5-6.) Be that as it may, the proper avenue for challenging the final judgment of a
9 district court decision is by appealing the matter to the Ninth Circuit, which Petitioner did
10 without success. See infra at fn. 1. Furthermore, as Petitioner has previously been
11 advised, he must first obtain an order from the Ninth Circuit Court of Appeals authorizing
12 this court to consider a second or successive petition containing previously raised or new
13 claims challenging the same state conviction.² See supra at 1.

14 Petitioner has not presented such an order from the Ninth Circuit. See 28 U.S.C. §
15 2244(b)(3)(A). Accordingly, the instant petition must be dismissed in its entirety as
16 second and successive.

17
18 **CONCLUSION**

19 For the foregoing reasons, the instant petition for a writ of habeas corpus is
20 DISMISSED without prejudice as second and successive. Petitioner may file another
21 petition in this Court if he obtains the necessary order from the Ninth Circuit.

22 No certificate of appealability is warranted in this case. See Rule 11(a) of the Rules
23 Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (requiring district court to rule on

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25 ¹ Petitioner appealed the matter, and the Ninth Circuit denied his request for a certificate of
26 appealability on September 24, 2008. See Wilson v. Campbell, No. 08-16320, slip op. at 1
(9th Cir. 2008).

27 ² Petitioner filed previous habeas actions which were also dismissed as second and
28 successive. See Wilson v. Warden, Case No. 13-05579 EJD (PR); Wilson v. Warden,
Case No. 14-00698 EJD (PR); Wilson v. Warden, Case No. 14-01942 EJD (PR).

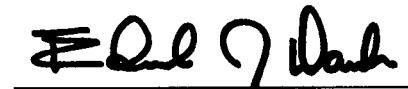
1 certificate of appealability in same order that denies petition). Petitioner has not shown
2 "that jurists of reason would find it debatable whether the petition states a valid claim of
3 the denial of a constitutional right and that jurists of reason would find it debatable
4 whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529
5 U.S. 473, 484 (2000).

6 Petitioner's motion for leave to proceed in forma paupers, (Docket No. 7), is
7 GRANTED. Docket No. 2 is DENIED as moot.

8 This order terminates Docket Nos. 2 and 7.

9 **IT IS SO ORDERED.**

10 Dated: 7/7/16



11 EDWARD J. DAVILA
12 United States District Judge

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United States District Court
Northern District of California

25 Order of Dismissal; Grant IFP
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7 PETER WILSON,
8 Plaintiff,
9 v.
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11 WARDEN,
12 Defendant.

Case No. 16-cv-01127-EJD

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 7/8/2016, I SERVED a true and correct copy(ies) of the attached, by placing 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 receptacle located in the Clerk's office.

17
18 Peter Wilson ID: P79916
19 Richard J. Donovan Correctional Facility
20 480 Alta Road
21 SAN DIEGO, CA 92179

Dated: 7/8/2016

22
23 Susan Y. Soong
24 Clerk, United States District Court

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26 By: Adriana M. Kratzmann
27 Adriana M. Kratzmann, Deputy Clerk to the
28 Honorable EDWARD J. DAVILA

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8 PETER WILSON,
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14 WARDEN,
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28 Case No. 16-01127 EJD (PR)

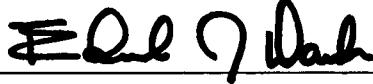
JUDGMENT

For the reasons stated in the order of dismissal, this action is DISMISSED without prejudice. Judgment is entered accordingly.

The Clerk shall close the file.

IT IS SO ORDERED.

Dated: 7/6/16


EDWARD J. DAVILA
United States District Judge

Judgment
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**Additional material
from this filing is
available in the
Clerk's Office.**