APPENDIX - A

NOT FOR PUBLICATION

FILED

AUG 21 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DERRAN SMILEY, Petitioner-Appellant, v. WILLIAM MUNIZ, Warden, Respondent-Appellee.	No. 16-17002 D.C. No. 5:15-cv-05507-RMW MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Submitted August 15, 2018**

Before: FARRIS, BYBEE, and N.R. SMITH, Circuit Judges.

California state prisoner Derran Smiley appeals pro se from the district court's judgment dismissing his 28 U.S.C. § 2254 habeas corpus petition. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

Contrary to Smiley's argument, the sole issue certified for appeal by the

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

district court is whether Smiley's habeas petition is second or successive. *See Hiivala v. Wood*, 195 F.3d 1098, 1103 (9th Cir. 1999) (a certificate of appealability ("COA") is granted "on an issue-by-issue basis, thereby limiting appellate review to those issues alone").

Smiley argues that his petition is not second or successive because the state court's amendments to the abstract of judgment in 2015 resulted in a new, intervening judgment under *Magwood v. Patterson*, 561 U.S. 320 (2010). The record shows the state court ordered the abstract of judgment corrected to reflect that the jury had found true kidnapping special allegations, and to include the penal code provision governing part of Smiley's sentence. These amendments corrected scrivener's errors, which arose from discrepancies between the oral pronouncement of sentence and the abstract of judgment; as such, they did not give rise to a new judgment. *See Gonzalez v. Sherman*, 873 F.3d 763, 772 (9th Cir. 2017) ("Correcting a scrivener's error in the abstract of judgment does not lead to a new judgment because the judgment itself does not change, only the written record that erroneously reflects that judgment.").

Smiley also contends that his petition is not second or successive because it raised claims that were not alleged in his first petition. A petition, however, is second or successive "if it raises claims that were or could have been adjudicated on their merits in an earlier petition." *Woods v. Carey*, 525 F.3d 886, 888 (9th Cir.

2008) (internal quotations omitted).

We treat Smiley's briefing of uncertified issues as a motion to expand the COA, and deny the motion along with his separately filed motions to expand the COA. *See* 9th Cir. R. 22-1(e); *Hiivala*, 195 F.3d at 1104-05.

AFFIRMED.

APPENDIX - B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DERRAN SMILEY, Petitioner-Appellant, v. WILLIAM MUNIZ, Warden, Respondent-Appellee.	No. 16-17002 D.C. No. 5:15-cv-05507-RMW Northern District of California, San Jose ORDER

Before: FARRIS, BYBEE, and N.R. SMITH, Circuit Judges.

Smiley's motion for an extension of time to file a petition for rehearing (Docket Entry No. 20) is denied as unnecessary. The petition for panel rehearing and for rehearing en banc was timely filed.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Smiley's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 21) are denied.

No further filings will be entertained in this closed case.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DERRAN SMILEY,

Petitioner,

v.

WILLIAM MUNIZ, Warden,

Respondent.

Case No. 15-cv-05507 RMW (PR)

ORDER GRANTING MOTION TO DISMISS; GRANTING CERTIFICATE OF APPEALABILITY

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 2006 sentence imposed by the Superior Court of Alameda County. The court issued an order to show cause. In lieu of an answer, respondent has filed a motion to dismiss the petition as an unauthorized second or successive petition. Petitioner has filed an opposition, and respondent has filed a reply. For the reasons stated below, the court GRANTS respondent's motion to dismiss the petition as an unauthorized second or successive petition.[1]

[1] Petitioner has also filed a motion to amend his petition. Because his proposed amendment challenges the same 2006 judgment at issue here, it would also be an unauthorized second or successive petition. Thus, petitioner's motion to amend is denied.

DISCUSSION

A district court must dismiss claims presented in a second or successive habeas petition challenging the same conviction and sentence unless the claims presented in the previous petition were denied for failure to exhaust. See 28 U.S.C. § 2244(b); Babbitt v. Woodford, 177 F.3d 744, 745-46 (9th Cir. 1999). Additionally, a district court must dismiss any new claims raised in a successive petition unless the petitioner received an order from the court of appeals authorizing the district court to consider the petition. See 28 U.S.C. § 2244(b). Although the AEDPA has not defined the term "second or successive," the Ninth Circuit has interpreted this phrase as one derived from the "abuse of the writ" doctrine developed pre-AEDPA. See, e.g., Felker v. Turpin, 518 U.S. 651, 664 (1996) (stating that Section 2244(b) is an evolutionary extension of the abuse of the writ doctrine). A petitioner, therefore, abuses the writ when he raises a habeas claim that could have been raised in an earlier petition unless he had a legitimate excuse for not doing so. See McCleskey v. Zant, 499 U.S. 467, 493 (1991).

In the underlying petition, petitioner states that the sentence imposed violated Blockburger v. United States, 284 U.S. 299 (1932). Specifically, petitioner claims that the trial court's imposition of a sentence of 25 years to life for his conviction on count 1 exceeded the maximum allowable sentence because both the kidnapping enhancement and the substantive offense (rape) relied upon a single transaction. Here, the instant petition is not petitioner's first habeas petition concerning his 2006 criminal judgment from the Alameda County Superior Court. Petitioner has filed a previous federal habeas petition, challenging the same 2006 convictions and sentence. In that petition, petitioner did not raise this underlying sentencing claim. This court denied petitioner's previous petition on the merits. See Smiley v. Evans, No. C 08-00045 RMW (N.D. Cal. denied Sept. 8, 2009).

Petitioner argues that his petition is not second or successive. He states that, in 2015, nine year after imposition of the judgment, he filed a motion for modification of his sentence, raising

the same claim he alleges in the underlying petition. Dkt. No. 12-2 at 4. The Superior Court denied the motion stating that it lacked jurisdiction to modify an authorized sentence, but corrected the abstract of judgment to correct a clerical error. Dkt. No. 12-2 at 81-82. Specifically, the Superior Court observed that although the jury had found true kidnapping special allegations for counts 2 through 6, the abstract of judgment did not accurately reflect the oral pronouncement of the sentence. Id. at 82. As to that clerical error, the Superior Court corrected the abstract of judgment. Id.

This is not a case like Magwood v. Patterson, in which the Supreme Court held that a challenge to new sentence after a subsequent sentencing hearing was not second or successive under Section 2244(b). Magwood, 561 U.S. 320, 342 (2010). In Magwood, the petitioner filed a habeas corpus petition and was granted a conditional writ of habeas corpus. As a result of that writ, petitioner was re-sentenced. He then filed another habeas corpus petition, challenging that new sentence. The Supreme Court determined that the new petition was not barred by the second or successive restriction because it challenged a new judgment. Similarly, in Wentzel v. Neven, the Ninth Circuit held that a petitioner's petition was not second or successive because it was the first petition to challenge a new, intervening judgment of conviction that was entered after the initial, partially successful habeas petition led to a new, amended judgment. Wentzel, 674 F.3d 1124, 1126-27, 1128 (9th Cir. 2012).

Here, instead, the state court did not amend the judgment, or enter a new judgment. See People v. Mitchell, 26 Cal.4th 181, 185 (2001) ("An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize."). Rather, the Superior Court corrected a clerical error so that the abstract reflected the oral pronouncement of the sentence. See, e.g., Johnson v. Duffy, No. 13-17376, 591 Fed. App'x. 629, 629-30 (9th Cir. 2015) (petition was second or successive where the amendment to abstract of judgment was a clerical change

which did not revise petitioner's sentence, petitioner was never resentenced, and the trial court never amended the original judgment) (unpublished memorandum disposition); Brownlee v. Rommoro, 2015 WL 3843364, at *3 (E.D. Cal. June 19, 2015) (finding that the Superior Court's amendment of abstract to correct a clerical error so that the abstract would conform with the oral pronouncement of judgment was not an "intervening" or "new" judgment as discussed in Magwood or Wentzell); Tate v. Trimble, 2013 WL 3816991, at *7 (C.D. Cal. July 18, 2013) (concluding that Magwood was not applicable where sentencing court's nunc pro tunc order corrected a clerical error regarding the petitioner's sentence and did not amount to a change in judgment).

In this case, petitioner was not resentenced, and his convictions and sentence were not disturbed. Thus, the revised abstract of judgment to correct a clerical error is not an intervening or new judgment. Therefore, the court finds that this federal petition is an unauthorized second or successive petition. Because both petitions challenge the same 2006 judgment, and petitioner has not presented an order from the Ninth Circuit Court of Appeals authorizing this court to consider any new claims, this court must dismiss the instant petition in its entirety. See 28 U.S.C. § 2244(b).

CONCLUSION

The instant habeas petition is DISMISSED without prejudice to refiling if petitioner obtains the necessary order. Petitioner's motion to amend the petition is DENIED. The clerk shall close the file.

Petitioner has shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right [or] 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). Specifically, a certificate of appealability is granted as to the issue of whether petitioner's petition is second or successive. Accordingly, a certificate of appealability is

GRANTED.

IT IS SO ORDERED.

DATED: 9/27/2016

Ronald M. Whyte
RONALD M. WHYTE
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California