

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

OCT 25 2019

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

JACK ROBERT SMITH,

Petitioner-Appellant,

v.

HARRY OREOL,

Respondent-Appellee.

No. 19-55031

D.C. No. 2:17-cv-05943-JFW-KK
Central District of California,
Los Angeles

ORDER

Before: O'SCANNLAIN and RAWLINSON, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Any pending motions are denied as moot.

DENIED.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK ROBERT SMITH,

Petitioner,

v.

HARRY OREOL,

Respondent.

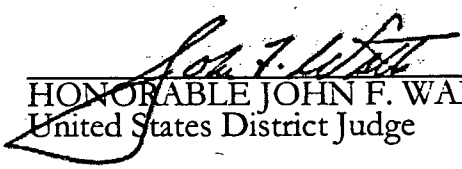
Case No. CV 17-5943-JFW (KK)

JUDGMENT

Pursuant to the Order Accepting Amended Findings and Recommendation of
United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the Petition is DENIED and this action is
DISMISSED without prejudice.

Dated: December 19, 2018


HONORABLE JOHN F. WALTER
United States District Judge

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6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
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10 JACK ROBERT SMITH,

11 Petitioner,

12 v.

13 HARRY OREOL,

14 Respondent.

Case No. CV 17-5943-JFW (KK)

ORDER DENYING MOTION FOR
RECONSIDERATION OF ORDER
DISMISSING ACTION WITHOUT
PREJUDICE

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16 I.

17 INTRODUCTION

18 On January 17, 2019, Jack Robert Smith ("Petitioner") constructively filed a
19 Motion for Reconsideration ("Motion") of the Court's December 19, 2018 Order
20 dismissing Petitioner's Petition for Writ of Habeas Corpus ("Petition") without
21 prejudice. For the reasons set forth below, the Motion is DENIED.

22 II.

23 DISCUSSION

24 On August 10, 2017, Petitioner constructively filed¹ the Petition challenging his
25 continued commitment at Patton State Hospital. ECF Docket No. ("Dkt.") 1. On

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27 ¹ Under the "mailbox rule," when a pro se prisoner gives prison authorities a
28 pleading to mail to court, the court deems the pleading constructively "filed" on the
date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010); see Jones
v. Blanas, 393 F.3d 918, 926 (9th Cir. 2004) (holding civilly confined individuals
entitled to "mailbox rule").

1 December 19, 2018, the Court denied the Petition and dismissed the action without
2 prejudice. Dkt. 71.

3 On January 2, 2019, Petitioner filed a Notice of Appeal. Dkt. 74. On January
4 17, 2019, Petitioner constructively filed the instant Motion for Reconsideration. Dkt.
5 76.

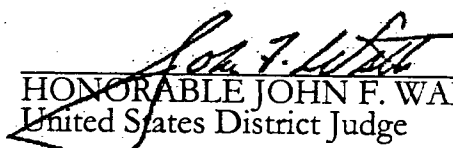
6 The effective filing of a notice of appeal transfers jurisdiction from the district
7 court to the court of appeals with respect to all matters involved in the appeal. Griggs
8 v. Provident Consumer Discount Co., 459 U.S. 56, 103 S. Ct. 400, 402, 74 L. Ed. 2d
9 225 (1982). Accordingly, this Court lacks jurisdiction to consider Petitioner's Motion.

10 **III.**

11 **ORDER**

12 IT IS THEREFORE ORDERED Petitioner's Motion for Reconsideration is
13 DENIED.

14
15 Dated: February 11, 2019

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17 HONORABLE JOHN F. WALTER
United States District Judge

18 Presented by:

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21 HONORABLE KENLY KIYA KATO
United States Magistrate Judge

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6 UNITED STATES DISTRICT COURT
7 CENTRAL DISTRICT OF CALIFORNIA
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10 JACK ROBERT SMITH,

11 Petitioner,

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13 HARRY OREOL,

14 Respondent.
15

Case No. CV 17-5943-JFW (KK)

AMENDED REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

16
17 This Amended Report and Recommendation is submitted to United States
18 District Judge John F. Walter, pursuant to 28 U.S.C. § 636 and General Order 05-07
19 of the United States District Court for the Central District of California.

20 I.

21 **SUMMARY OF RECOMMENDATION**

22 Petitioner Jack Robert Smith ("Petitioner") has filed a pro se Petition for Writ
23 of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254, challenging his
24 continued commitment at Patton State Hospital. Petitioner argues the procedures for
25 seeking restoration of sanity set forth in California Penal Code § 1026.2 ("Section
26 1026.2") are unconstitutional and seeks an order directing Respondent to immediately
27 release him from Patton State Hospital. For the reasons set forth below, the Court
28 recommends denying the Petition and dismissing the action without prejudice.

II.

PROCEDURAL HISTORY

On November 15, 2012, Petitioner was ordered committed to the care of Patton State Hospital for a period not to exceed nineteen years and eight months based on findings by the Los Angeles County Superior Court that he was guilty of assault with a firearm, carrying a loaded firearm, and exhibiting a firearm, but that Petitioner was not sane within the meaning of Section 1026 of the California Penal Code at the time of the commission of the offense. Lodg. 1 at 13-16.¹

On June 16, 2015, Petitioner filed a petition for restoration of sanity pursuant to Section 1026.2 in Los Angeles County Superior Court. Id. at 22.

On July 1, 2015, the superior court held a hearing on Petitioner's Section 1026.2 petition. Lodg. 1 at 23. On September 24, 2015, the Section 1026.2 petition was taken off calendar at Petitioner's request because Petitioner asserts "there was absolutely no reason to go through the trial process" where the outcome of the hearing would require his participation in a conditional release program ("CONREP") for one year before being eligible for unconditional release. Id. at 24; see also Dkt. 35 at 3.

On May 17, 2016, Petitioner filed a petition for writ of habeas corpus in the San Bernardino County Superior Court challenging his continued commitment on the grounds his sanity had been restored and seeking unconditional release. Lodg. 2; Dkt. 1 at 9-10. On July 5, 2016, the superior court denied the petition. Dkt. 1 at 9.

On September 30, 2016, Petitioner filed a petition for writ of habeas corpus in the California Court of Appeal challenging his continued commitment on the grounds his sanity had been restored and Section 1026.2 is not an adequate remedy in violation of his constitutional due process rights. Lodg. 3. On October 5, 2016, the California Court of Appeal summarily denied the petition. Dkt. 1 at 11.

¹ The Court's citations to Lodged Documents refer to the documents lodged by Respondent in support of the Motion to Dismiss. See ECF Docket No. ("Dkt.") 22.

1 On October 15, 2016, Petitioner constructively filed² a petition for writ of
 2 habeas corpus in the California Supreme Court again challenging his continued
 3 commitment on the grounds his sanity had been restored and Section 1026.2 is not an
 4 adequate remedy in violation of his constitutional due process rights. Lodg. 4. On
 5 July 26, 2017, the California Supreme Court summarily denied the petition. Dkt. 1 at
 6 12.

7 On August 10, 2017, Petitioner constructively filed the instant Petition in this
 8 Court challenging his continued commitment on the grounds Section 1026.2 violates
 9 the Fourteenth Amendment because it “[f]orc[es] a citizen to be confined at
 10 CONREP involuntarily when they are deemed non dangerous & or not mentally ill.”
 11 Dkt. 1 at 13-14. Petitioner argues he is no longer dangerous and, therefore, his
 12 continued confinement and the requirement that he participate in CONREP for a
 13 year violates due process under Foucha v. Louisiana, 504 U.S. 71, 86, 112 S. Ct. 1780,
 14 1788, 118 L. Ed. 2d 437 (1992).³ Dkt. 1 at 13-14. Petitioner seeks his immediate,
 15 unconditional release from Patton State Hospital without having to participate in
 16 CONREP. Id. at 13.

17 On July 6, 2018, Respondent filed an Answer arguing (a) the Petition is
 18 untimely; (b) the Petition is barred by Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060,
 19 103 L. Ed. 2d 334 (1989); (c) Petitioner lacks standing to challenge the
 20 constitutionality of Section 1026.2; and (d) Petitioner’s claims lack merit. Dkt. 54.

21 On July 11, 2018 Petitioner constructively filed a Traverse. Dkt. 55.
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 23

24 ² Under the “mailbox rule,” when a pro se prisoner gives prison authorities a pleading
 25 to mail to court, the court deems the pleading constructively “filed” on the date it is
 26 signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010); see Jones v.
Blanas, 393 F.3d 918, 926 (9th Cir. 2004) (holding civilly confined individuals entitled
 to “mailbox rule”).

27 ³ In Foucha, the United States Supreme Court held that a state may not continue to
 28 confine an insanity acquittee unless he is both dangerous and mentally ill. Foucha,
 504 U.S. at 77.

1 On July 23, 2018, the Court issued a Report and Recommendation finding
2 Petitioner lacked standing because he did not have a pending application for release
3 under Section 1026.2 and failed to state any definite plans to file an application for
4 release under Section 1026.2. Dkt. 57.

5 On August 9, 2018, Petitioner filed an Objection to the original Report and
6 Recommendation stating he has now filed a second application for release under
7 Section 1026.2. Dkt. 59. On August 15, 2018, Petitioner filed an “Addendum to
8 Objection” attaching a copy of an application for release under Section 1026.2 that
9 had been filed in the Los Angeles County Superior Court filed on August 10, 2018.
10 Dkt. 61. On August 20, 2018, Respondent filed a reply arguing Petitioner still lacked
11 standing and alternatively the Court should deny the Petition for the reasons set forth
12 in Respondent’s Answer. Dkt. 62.

13 This matter thus stands submitted and ready for decision.

14 **III.**

15 **DISCUSSION**

16 **A. RESTORATION OF SANITY UNDER SECTION 1026.2**

17 Section 1026.2 provides that a person found not guilty by reason of insanity
18 may apply for release upon the ground that his or her sanity has been restored
19 pursuant to a two-step procedure. Cal. Penal Code § 1026.2.

20 First, the state court must hold a hearing to determine whether the applicant
21 would be “a danger to the health and safety of others, due to mental defect, disease,
22 or disorder, if under supervision and treatment in the community.” *Id.* § 1026.2(e).
23 Upon finding that the applicant will not be a danger due to mental defect while under
24 supervision and treatment in the community, the court is required to place the
25 applicant with an appropriate forensic conditional release program (“CONREP”) for
26 one year. *Id.* “The court shall not determine whether the applicant has been restored
27 to sanity until the applicant has completed the one year in the appropriate forensic
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1 conditional release program, unless the community program director sooner makes a
2 recommendation for restoration of sanity and unconditional release.” Id.

3 Second, following successful completion of the one-year CONREP program,
4 the state court must hold a trial to determine whether the applicant has been restored
5 to sanity, “which means the applicant is no longer a danger to the health and safety of
6 others, due to mental defect, disease, or disorder”, and, therefore, unconditional
7 release should be granted. Id. § 1026.2(e). The trial may be held prior to the
8 completion of one year in the conditional release program if, at any time during the
9 conditional release program, the community program director forms the opinion that
10 the applicant is “no longer a danger to the health and safety of others, due to mental
11 defect, disease, or disorder” and submits a report of his opinion and
12 recommendations to the committing court, the prosecuting attorney, and the attorney
13 for the applicant. Id. § 1026.2(h).

14 **B. PETITIONER NOW HAS STANDING DUE TO HIS PENDING**
15 **SECTION 1026.2 PETITION**

16 Respondent first argues Petitioner lacks standing despite having filed an
17 application for release because “it is still speculative that he will be found to no longer
18 be a danger to others such that he will be placed in CONREP.” Dkt. 62 at 4.

19 “The doctrine of standing is comprised of both Article III requirements and
20 prudential considerations.” Hartman v. Summers, 120 F.3d 157, 159 (9th Cir. 1997)
21 (citing LaDuke v. Nelson, 762 F.2d 1318, 1323 (9th Cir. 1985), am. 796 F.2d 309 (9th
22 Cir. 1986)). Standing generally requires a showing of three elements: 1) “injury in
23 fact’ – an invasion of a legally protected interest which is (a) concrete and
24 particularized” and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical’”; 2)
25 causal connection between the injury and the conduct complained of; and 3)
26 likelihood that the injury will be redressed by a favorable decision. Lujan v. Defs. of
27 Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). “To confer
28 standing, the threat of future injury must be credible rather than remote or

hypothetical.” Hartman, 120 F.3d at 160 (citing Nelsen v. King County, 895 F.2d 1248, 1250 (9th Cir. 1990)). In Hartman, the Ninth Circuit found the petitioner failed to show imminent injury because he failed “to state any definite plans to file an application for release under § 1026.2 which would make him subject to § 1026.2 and fulfill the ‘injury in fact’/imminent harm requirement of Article III.” 120 F.3d at 160.

Here, unlike in Hartman, Petitioner has now filed an application for release under Section 1026.2. Thus, Petitioner will be subject to the procedure he claims is unconstitutional – that he be required to be eligible for and complete CONREP before unconditional release. Cf. Hartman, 120 F.3d at 160. Accordingly, based on Petitioner’s claim that he has a pending application for release, Petitioner has sufficiently alleging standing.⁴ The Court will, therefore, address the merits of the Petition.

C. HABEAS RELIEF IS NOT WARRANTED ON PETITIONER’S CLAIM THAT SECTION 1026.2 IS UNCONSTITUTIONAL

Petitioner argues Section 1026.2 is unconstitutional because it “[f]orc[es] a citizen to be confined at CONREP involuntarily when they are deemed non dangerous & or not mentally ill”. Dkt. 1 at 13; Dkt. 55 at 1. Petitioner maintains he is seeking “ ‘unconditional release’ because [he is] ‘non-dangerous, not mentally ill’ & ‘continued hospitalization & CONREP’ is not only ‘against [his] doctor’s recommendations’ but it ‘violates [his] Constitutional rights.’” Dkt. 27 at 1.

Petitioner cites Foucha v. Louisiana, 504 U.S. 71, 71, 112 S. Ct. 1780, 1781, 118 L. Ed. 2d 437 (1992) in support of his position that he is being held in violation of the constitution because he does not have a mental defect that would make him a danger to the health and safety of others. Dkt. 1 at 14; Dkt. 26 at 2. In Foucha, the trial court found petitioner was no longer suffering from a mental disease or illness. 504

⁴ “[P]arties may cure standing deficiencies through supplemental pleadings.” Northstar Fin. Advisors Inc. v. Schwab Investments, 779 F.3d 1036, 1044 (9th Cir. 2015), as amended on denial of reh’g and reh’g en banc (Apr. 28, 2015).

1 U.S. at 71. The petitioner was not released, however, because the state statute
2 permitted his continued confinement based solely on the trial court's finding he "was
3 dangerous to himself and others." Id. at 75. The Supreme Court held the statute
4 violated due process by permitting "the indefinite detention of insanity acquittees who
5 are not mentally ill but who do not prove they would not be dangerous to others."
6 Id. at 83.

7 Here, unlike the petitioner in Foucha, no court has found Petitioner is not
8 dangerous or mentally ill, and Respondent does not concede that Petitioner is not
9 dangerous or mentally ill. Moreover, unlike the state statute at issue in Foucha, the
10 California statute Section 1026.2 does not permit the state to hold an insanity
11 acquittee who is found either not mentally ill or not dangerous. Rather, pursuant to
12 Section 1026.2, at the conclusion of one year in CONREP (or sooner if the program
13 director makes such a recommendation), Petitioner will receive a trial to determine
14 whether restoration of sanity and unconditional release should be granted.

15 Petitioner also cites O'Connor v. Donaldson, 422 U.S. 563, 565, 95 S. Ct. 2486,
16 2489, 45 L. Ed. 2d 396 (1975) in support of his position that CONREP is
17 unconstitutional because Petitioner is capable of living "with the aid of responsible
18 family or friends." Dkt. 27 at 2. Petitioner appears to be arguing that he should be
19 permitted unconditional release because his mother has offered to care for him. See
20 Dkt. 1 at 14. In Donaldson, the Supreme Court held "a State cannot constitutionally
21 confine without more a nondangerous individual who is capable of surviving safely in
22 freedom by himself **or with the help of willing and responsible family members**
23 **or friends.**" 422 U.S. at 576 (emphasis added). However, Donaldson did not involve
24 an insanity acquittee, but rather a person civilly committed. The Supreme Court has
25 recognized that states may treat insanity acquittees differently from persons subject to
26 civil commitment because the two groups are not similarly situated. Foucha, 504 U.S.
27 at 85-86. Therefore, Donaldson is not applicable to Petitioner's case.

1 Finally, even if Petitioner could succeed in showing CONREP is
2 unconstitutional on its face, the most he would be entitled to is a trial regarding his
3 sanity.⁵ Therefore, Petitioner's request for unconditional release must be denied.⁶

4 IV.

5 **RECOMMENDATION**

6 IT IS THEREFORE RECOMMENDED that the District Court issue an
7 Order: (1) accepting this Amended Report and Recommendation; (2) denying the
8 Petition; and (3) dismissing this action without prejudice.

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10 Dated: October 29, 2018



11 HONORABLE KENLY KIYA KATO
12 United States Magistrate Judge
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23 ⁵ The Court notes that converting the Petition to a civil rights complaint under 28
24 U.S.C. § 1983 is not warranted here in light of Petitioner's insistence that the relief he
is seeking is immediate, unconditional release.

25 ⁶ In his Objection, Petitioner raises a new argument that Section 1026.2 is "void for
26 vagueness" because at Petitioner's "NGI sentencing hearing the state court judge was
'unconstitutionally vague' in explaining the precise terms & conditions of [his] civil
27 commitment." Dkt. 59 at 16. First, the Court declines to review these new claims,
because a petitioner is not permitted to raise new claims in an objection. See
28 Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994). More importantly,
however, Petitioner is not arguing the statute is vague as written, but only that it was
unsatisfactorily explained to him at his commitment hearing.

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

DEC 23 2019

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

JACK ROBERT SMITH,

No. 19-55031

Petitioner-Appellant,

D.C. No. 2:17-cv-05943-JFW-KK
Central District of California,
Los Angeles

v.

HARRY OREOL,

ORDER

Respondent-Appellee.

Before: TALLMAN and NGUYEN, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 7) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11. No further filings will be entertained in this closed case.