

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JAN 10 2020

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

JUAN MIGUEL LOPEZ,

Petitioner-Appellant,

v.

STU SHERMAN, Warden,

Respondent-Appellee.

No. 19-15519

D.C. No. 1:18-cv-01528-AWI-SAB
Eastern District of California,
Fresno

ORDER

Before: THOMAS, Chief Judge, and PAEZ, Circuit Judge.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUAN MIGUEL LOPEZ,

Petitioner,

v.

STU SHERMAN,

Respondent.

Case No. 1:18-cv-01528-AWI-SAB-HC

ORDER ADOPTING FINDINGS AND
RECOMMENDATION, DISMISSING
PETITION FOR WRIT OF HABEAS
CORPUS, DIRECTING CLERK OF COURT
TO CLOSE CASE, AND DECLINING TO
ISSUE A CERTIFICATE OF
APPEALABILITY

(ECF No. 7)

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On November 26, 2018, the Magistrate Judge issued Findings and Recommendation that recommended dismissing the petition for failure to state a cognizable federal habeas claim. (ECF No. 7). Petitioner filed timely objections. (ECF No. 8).

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a *de novo* review of the case. Having carefully reviewed the entire file, including Petitioner's objections, the Court concludes that the Findings and Recommendation is supported by the record and proper analysis. Petitioner asserts that his sentence violates California Penal Code section 1170.1 and should be recalled pursuant to California Penal Code section 1170.126 because recent cases have held that second-degree robbery does not qualify as a violent felony under the Armed Career Criminal Act ("ACCA"). However, Petitioner was not sentenced pursuant to the ACCA, and whether Petitioner's sentence violates California Penal Code section

1170.1 and should be recalled pursuant to California Penal Code section 1170.126 is an issue of state law that does not warrant federal habeas corpus relief. See Estelle v. McGuire, 502 U.S. 62, 67–68 (1991) (“We have stated many times that ‘federal habeas corpus relief does not lie for errors of state law.’ Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”).

A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court’s denial of his petition, and an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person’s detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

To obtain a certificate of appealability under § 2253(c), a petitioner “must make a substantial showing of the denial of a constitutional right, . . . includ[ing] showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve

1 encouragement to proceed further.” Slack v. McDaniel, 529 U.S. 473, 483–84 (2000) (quoting
2 Barefoot v. Estelle, 463 U.S. 880, 893 & n.4 (1983)).

3 In the present case, the Court finds that reasonable jurists would not find the Court’s
4 determination that Petitioner’s federal habeas corpus petition should be dismissed debatable or
5 wrong, or that Petitioner should be allowed to proceed further. Therefore, the Court declines to
6 issue a certificate of appealability.

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. The Findings and Recommendation issued on November 26, 2018 (ECF No. 7) is
9 ADOPTED;
10 2. The petition for writ of habeas corpus is DISMISSED;
11 3. The Clerk of Court is directed to CLOSE the case; and
12 4. The Court DECLINES to issue a certificate of appealability.

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14 IT IS SO ORDERED.

15 Dated: March 8, 2019



16 SENIOR DISTRICT JUDGE
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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 JUAN MIGUEL LOPEZ,

12 Petitioner,

13 v.

14 STU SHERMAN,

15 Respondent.
16

Case No. 1:18-cv-01528-AWI-SAB-HC

FINDINGS AND RECOMMENDATION TO
DISMISS PETITION FOR WRIT OF
HABEAS CORPUS

17 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
18 pursuant to 28 U.S.C. § 2254.

19 **I.**

20 **DISCUSSION**

21 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a
22 habeas petition and allows a district court to dismiss a petition before the respondent is ordered
23 to file a response, if it “plainly appears from the petition and any attached exhibits that the
24 petitioner is not entitled to relief in the district court.”

25 By statute, federal courts “shall entertain an application for a writ of habeas corpus in
26 behalf of a person in custody pursuant to the judgment of a State court only on the ground that he
27 is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
28 § 2254(a). “[T]he second use of ‘in custody’ in the statute requires literally that the person

1 applying for the writ is contending that he is 'in custody' in violation of *the Constitution or other*
2 *federal laws.*" Bailey v. Hill, 599 F.3d 976, 979 (9th Cir. 2010) (emphasis added). See Dickerson
3 v. United States, 530 U.S. 428, 439 n.3 (2000).

4 In the instant petition, Petitioner asserts that his sentence violates California Penal Code
5 section 1170.1 and should be recalled pursuant to California Penal Code section 1170.126
6 because recent cases have held that second-degree robbery is not a violent felony. (ECF No. 1 at
7 6).¹ Whether Petitioner's sentence is lawful under the California Penal Code is an issue of state
8 law, and errors of state law do not warrant federal habeas corpus relief. See Wilson v. Corcoran,
9 562 U.S. 1, 5 (2010) (per curiam) ("[I]t is only noncompliance with federal law that renders a
10 State's criminal judgment susceptible to collateral attack in the federal courts."); Estelle v.
11 McGuire, 502 U.S. 62, 67-68 (1991) ("We have stated many times that 'federal habeas corpus
12 relief does not lie for errors of state law.' Today, we reemphasize that it is not the province of a
13 federal habeas court to reexamine state-court determinations on state-law questions." (citations
14 omitted)). Accordingly, Petitioner's challenge of his sentence is not cognizable in federal habeas
15 corpus, and the petition should be dismissed.

16 II.

17 RECOMMENDATION

18 Accordingly, the undersigned HEREBY RECOMMENDS that the petition for writ of
19 habeas corpus be DISMISSED for failure to state a cognizable federal habeas claim.

20 This Findings and Recommendation is submitted to the assigned United States District
21 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
22 Rules of Practice for the United States District Court, Eastern District of California. Within
23 **THIRTY (30) days** after service of the Findings and Recommendation, Petitioner may file
24 written objections with the court and serve a copy on all parties. Such a document should be
25 captioned "Objections to Magistrate Judge's Findings and Recommendation." The assigned
26 United States District Court Judge will then review the Magistrate Judge's ruling pursuant to 28
27 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified

28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 time may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d
2 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

3
4 IT IS SO ORDERED.

5 Dated: November 26, 2018


UNITED STATES MAGISTRATE JUDGE

SUPREME COURT
FILED

OCT 10 2018

Court of Appeal, Fifth Appellate District - No. F077710

Jorge Navarrete Clerk

S250861

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JUAN M. LOPEZ on Habeas Corpus.

The petition for review is denied.

Corrigan, J., was absent and did not participate.

CANTIL-SAKAUYE
Chief Justice

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

In re

JUAN M. LOPEZ,

On Habeas Corpus.

F077710

(Madera Super. Ct. No. MCR043130A)

ORDER

BY THE COURT:*

The "Petition for Writ of Habeas Corpus," filed on July 3, 2018, is denied.



Smith, A.P.J.

* Before Smith, A.P.J., Meehan, J. and Snauffer, J.

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