APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 6 2020

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

DANIEL F. BORDEN, Sr.,

Petitioner-Appellant,

v.

GARY SWARTHOUT, Warden,

Respondent-Appellee.

No. 20-15843

D.C. No. 2:14-cv-01400-MCE-DMC
Eastern District of California,
Sacramento

ORDER

Before: McKEOWN and BADE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 10) 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); *Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005); *Ortiz v. Stewart*, 195 F.3d 520, 520-21 (9th Cir. 1999).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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MAY 7 2020

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

DANIEL F. BORDEN, Sr.,

Petitioner-Appellant,

v.

GARY SWARTHOUT, Warden,

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D.C. No.
2:14-cv-01400-MCE-DMC
Eastern District of California,
Sacramento

ORDER

Before: Peter L. Shaw, Appellate Commissioner.

The district court has not issued or declined to issue a certificate of appealability in this appeal, which appears to arise from the denial of petitioner's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). *See Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (certificate of probable cause to appeal necessary to appeal denial of post-judgment motion for relief under Rule 60(b)). Accordingly, this case is remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the court's earliest convenience. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

If the district court issues a certificate of appealability, the court should specify which issue or issues meet the required showing. *See* 28 U.S.C. § 2253(c)(3); *Asrar*, 116 F.3d at 1270. Under *Asrar*, if the district court declines to

JW/Pro Se

issue a certificate, the court should state its reasons why a certificate of appealability should not be granted, and the Clerk of the district court shall forward to this court the record with the order denying the certificate. *See Asrar*, 116 F.3d at 1270.

The Clerk shall send a copy of this order to the district court judge.

APPENDIX "B"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DANIEL F. BORDEN,

Plaintiff,

v.

GARY SWARTHOUT,

Defendant.

No. 2:14-CV-01400-MCE-DMC

ORDER

Defendant's Motion for Relief From Judgment (ECF No. 40) is DENIED. No further filings will be entertained in this closed account and any such filings will be summarily STRICKEN.

IT IS SO ORDERED.

Dated: April 21, 2020

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE

MIME-Version:1.0 From:caed_cmecf_helpdesk@caed.uscourts.gov To:CourtMail@localhost.localdomain Message-Id: Subject:Activity in Case 2:14-cv-01400-MCE-DMC (HC) Borden v. Swarthout Order on Motion for Reconsideration. Content-Type: text/html

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U.S. District Court

Eastern District of California - Live System

Notice of Electronic Filing

The following transaction was entered on 4/21/2020 at 11:23 AM PDT and filed on 4/21/2020

Case Name: (HC) Borden v. Swarthout
Case Number: 2:14-cv-01400-MCE-DMC
Filer:
WARNING: CASE CLOSED on 03/31/2016
Document Number: 46
Docket Text:
ORDER signed by Senior Judge Morrison C. England, Jr on 4/21/2020 DENYING [40] Motion for Relief from Judgment. No further filings will be entertained in this closed account and any such filings will be summarily STRICKEN. (Coll, A)

2:14-cv-01400-MCE-DMC Notice has been electronically mailed to:

Doris Calandra   doris.calandra@doj.ca.gov, carolyn.allen@doj.ca.gov, daniel.bernstein@doj.ca.gov, diane.boggess@doj.ca.gov, docketingSACAWT@doj.ca.gov, ECFCoordinator@doj.ca.gov

2:14-cv-01400-MCE-DMC Electronically filed documents must be served conventionally by the filer to:

Daniel F. Borden
G-44478
CALIFORNIA STATE PRISON, SOLANO (4000)
P.O. BOX 4000
VACAVILLE, CA 95696-4000

The following document(s) are associated with this transaction:

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DANIEL F. BORDEN,

Plaintiff,

v.

GARY SWARTHOUT,

Defendant.

No. 2:14-CV-01400-MCE-DMC

ORDER

This case is on remand from the Ninth Circuit for the limited purpose of determining whether a certificate of appealability should issue. ECF No. 53. The Court hereby DECLINES to issue a certificate of appealability because Petitioner 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 [this 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).

IT IS SO ORDERED.

Dated: May 29, 2020

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE

MIME-Version:1.0 From:caed_cmecf_helpdesk@caed.uscourts.gov To:CourtMail@localhost.localdomain Message-Id: Subject:Activity in Case 2:14-cv-01400-MCE-DMC (HC) Borden v. Swarthout Order on Motion for Certificate of Appealability. Content-Type: text/html

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U.S. District Court

Eastern District of California - Live System

Notice of Electronic Filing

The following transaction was entered on 06/01/2020 at 08:37:43 AM PDT and filed on 06/01/2020

Case Name:	(HC) Borden v. Swarthout
Case Number:	2:14-cv-01400-MCE-DMC
Filer:	
WARNING: CASE CLOSED on 03/31/2016	
Document Number:	55

Docket Text:
ORDER signed by Senior Judge Morrison C. England, Jr on 5/29/2020 DECLINING to issue Certificate of Appealability. (cc: USCA) (Zignago, K.)

2:14-cv-01400-MCE-DMC Notice has been electronically mailed to:

2:14-cv-01400-MCE-DMC Electronically filed documents must be served conventionally by the filer to:

Daniel F. Borden
G-44478
CORRECTIONAL TRAINING FACILITY (686)
P.O. BOX 686
SOLEDAD, CA 93960-0686

Doris Calandra
California Attorney General
1300 I Street
Sacramento, CA 95616

The following document(s) are associated with this transaction:
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UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK
501 "I" Street
Sacramento, CA 95814

DANIEL F. BORDEN,
Plaintiff

v.

CASE NO. 2:14-CV-01400-MCE-DMC

GARY SWARTHOUT,
Defendant

You are hereby notified that a Notice of Appeal was filed on **May 01, 2020** in the above entitled case. Enclosed is a copy of the Notice of Appeal, pursuant to FRAP 3(d).

May 4, 2020

KEITH HOLLAND
CLERK OF COURT

by: /s/ H. Kaminski
Deputy Clerk

APPENDIX "C"

S256646

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re DANIEL F. BORDEN on Habeas Corpus.

The petition for writ of habeas corpus is denied. Individual claims are denied, as applicable. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474 [a petition for writ of habeas corpus must include copies of reasonably available documentary evidence]; *In re Dixon* (1953) 41 Cal.2d 756, 759 [courts will not entertain habeas corpus claims that could have been, but were not, raised on appeal]; *In re Swain* (1949) 34 Cal.2d 300, 304 [a petition for writ of habeas corpus must allege sufficient facts with particularity].)

CANTIL-SAKAUYE

Chief Justice

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

In re DANIEL F. BORDEN on Habeas Corpus.

Case No. C089533

BY THE COURT:

The petition for writ of habeas corpus is denied.

ROBIE, Acting P.J.

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cc: See Mailing List

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: In re DANIEL F. BORDEN on Habeas Corpus
C089533

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

Daniel F. Borden
CDC #: G44478
Correctional Training Facility
P.O. Box 689
Soledad, CA 93960

Office of the State Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Daniel F. Borden, CDCR# G-44478
California Training Facility
P.O. Box 689
Soledad, CA 93960-0689

Petitioner in Propria Persona

CALIFORNIA COURT OF APPEAL

IN AND FOR THE THIRD APPELLATE DISTRICT

In the Matter of the Application of:	Case No.: 17HC00433 07F04303
DANIEL F. BORDEN, Petitioner,	PETITION FOR WRIT OF HABES CORPUS
v.	
CRAIG KOENIG, Warden, Respondent(s).	

COMES NOW Daniel F. Borden ("Petitioner") herein seeking to establish by proof and competent evidence that his Due Process rights were violated and that he is factually innocent and illegally confined.

PROCEDURAL POSTURE

On or about December 13, 2018, Petitioner filed a "Petition for Complaint for Prejudice" in the Sacramento County Superior Court alleging, among other things, substantial and fundamental error and prejudice. Petitioner inadvertently insinuated that he presented the claims raised herein in the appellate court prior to the filing in the superior court.

2. Petitioner was deprived of a reasonable opportunity to present exculpatory evidence at his trial, and was denied a reasonable opportunity to prepare a proper defense when the trial court failed to conduct a fair or evidentiary hearing, despite a calendared hearing set by the court, violating his Due Process rights protected under the state and federal Constitutions.

On March 24, 2007, Petitioner was charged in a single information with simple battery. No amended information notifying Petitioner or counsel of potential arson, AND Terrorist Threats related charges had been filed by the district attorney prior to preliminary hearing. Thus, Petitioner had effectively been deprived of a fair notice with respect to the arson "et al" related charges, and deprived of a reasonable opportunity to prepare a defense at the preliminary hearing stage. 1/

On November 2, 2007, Petitioner was held to answer not only on the battery charge, he was also held to answer on the arson related charges. An amended information was then filed on November 9, 2007. (Exhibit A1-A6.)

Petitioner's counsel made contemporaneous objections at the preliminary hearing and in the superior courts stages. Trial counsel also moved for a continuance to acquire proof that Petitioner was at the Arden Fair Mall (35 miles away) during the time the fire was set. Exculpatory evidence such as: surveillance footage of Petitioner shopping during

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1/ Notwithstanding the fact that Petitioner's counsel failed to conduct any Pre-Preliminary Hearing Discovery, Petitioner asserts that he is still Constitutionally entitled to fair notice at the preliminary hearing stage.

the time the fire was set; and, letters written by the victim that had been seized by way of a warrantless search - would have been acquired by defense counsel and presented at the fostered hearing regarding these issues. 2/

However, a new judge had taken over the case who wholly impeded any further attempt by the defense to present said exculpatory evidence. The new judge even overruled and disregarded the previously set hearing calendared by Judge Roman - effectively denying Petitioner a defense.

In Jennings v. Superior Court of Consta Costa County, 66 Cal.2d 867 (1967), Jennings is charged by complaint with illegal; possession of narcotics and narcotics paraphernalia. At the outset of his preliminary hearing, Jennings notified the court that he attempted to subpoena a witness, but that the return had just been handed to him. Jennings' witness was out on bail on a pending criminal charge and was due to appear in court the following week. There was a very serious question as to whether the contraband in issue had been in possession of the witness. The court denied Jennings' request for a continuance. Jennings

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2/ Notwithstanding the procedural violations with respect to the fair notice violations mentioned at the onset, the court (Judge Roman) calendared a hearing to hear the alibi evidence and the writings by the victim.

then moved to set aside the information under Penal Code section 955. The motion was denied and Jennings initiated the proceeding for a writ of prohibition. The court issued the writ of prohibition because the denial of the continuance was an abuse of discretion and limitations placed on the cross-examination of the prosecution's witness denies Jennings a fair hearing. The court held that the absence of a material witness for the defense was a recognized ground for a continuance. The court further found that the cross-examination denied was intended to aid in establishing Jennings' defense.

> While the determination of whether in any given case a continuance should be granted 'normally rests in the discretion of the trial court' (People v. Buckowski (1951) 37 Cal.2d 629, 631 [233 p.2d 912]), that discretion may not be exercised in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense. 'That counsel for a defendant was a right to reasonable opportunity to prepare for a trial is a fundamental as is the right to counsel.' (People v. Sarazzawski (1945) 27 Cal.2d 7, 17 [161 P.2d 934]; accord. Cooper v. Superior Court (1961) 55 Cal.2d 291, 302 [10 Cal.Rptr. 842, 359 P.2d 274].) It is also as fundamental as the defendant's right to be advised of the charges against him, for the latter right is illusory if he then is denied sufficient time to prepare to meet such charges. (See In re Hess (1955) 45 Cal.2d 171, 175 [288 P.2d 5], and cases cited.) (People v. Murphy (1963) 59 Cal.2d 818, 825 [31 Cal.Rptr. 306, 382 P.2d 346].)

(Id.)

Here, Petitioner's rights were wholly disregarded. The aforementioned hearing and continuance - of which a judge previously granted - was abruptly and without explanation, overruled by the incoming judge.

In U.S. v. Joseph, 310 F.3d 975 (7th Cir. 2002), the government

suggested that it couldn't review the evidentiary ruling because Joseph waived his right to challenge the admissibility of the disputed evidence by failing to object properly in the district court, and/or he effectively withdrew his objection by later stipulating about the mail theft.

The court looked to the question of "bad acts" and whether certain requisites were met: (1) the evidence is directed towards a matter in issue; (2) the prior act is similar enough and close enough in time to the charged offense(s); (3) the jury can find from the evidence that the defendant committed the prior act; and, (4) the danger of unfair prejudice not substantially outweigh the probative value of the evidence.

Although the court held that Joseph's mail theft conviction was properly admitted, the court held that although counsel did not cite Rule 404(b) explicitly at the motion-in-limine, he did say enough to preserve that ground on appeal.

Here, Petitioner's trial counsel did more than "say enough," Judge Roman actually calendared a hearing to hear the exculpatory evidence discussed above (e.g., see Exhibit B1 [Correspondence to District Attorney seeking return of seized property pursuant to Penal Code section 1538]; Exhibits B2-B3 [Witness statements establishing reasonable doubt with respect to identity]; and Exhibit B4 [Evidence of police Corruption]). As such, there is no evidence whatsoever that Petitioner waived his right to said calendared hearing and requisite continuance(s).

Lastly, the failure to conduct said calendared fair or evidentiary hearing, effectively deprived Petitioner both Jencks and Brady material. The Jencks Act is designed to provide the defense with access to impeachment material, and critical to analysis of alleged violation is whether timing of the disclosures of the materials prevented its effective use by the defense. (U.S. v. Brumel-Alvarez, 976 F.2d 1235 (9th Cir. 1992).)

Impeachment evidence, as well as exculpatory evidence, falls within the Brady rule because such evidence is evidence favorable to the accused. (Lambert v. Blackwell, 387 F.3d 210 (3rd Cir. 2004).)

Petitioner submits, that even with the structural error prohibiting him from acquiring further exculpatory or impeaching evidence, the record supports his claims that dubious state actors took part in sabotaging his defense (e.g., police officer charged with stealing money; unwarranted seizure of $15,000, letters, etc.).

The failure to allow Petitioner's counsel to present evidence relating to impeachment of prosecution witnesses is deemed to be a suppression of Brady material. (Paradis v. Arave, 240 F.3d 1169 (9th Cir. 2001).)

CONCLUSION

For these reasons, this Court should find that Petitioner's rights were violated when the trial court: (1) failed to conduct a fair or evidentiary hearing previously calendared; (2) denied Petitioner a reasonable opportunity to present a defense by refusing to return property listed in a warrantless illegal search - thus, denying Petitioner a reasonable opportunity to present impeaching and exculpatory evidence; (3) failed to advise Petitioner of his rights; and (4) lacked jurisdiction to pronounce judgment pursuant to section 1202. (5) Judge Frawley's prejudice was also evident when he made sure [no] cure would be given Petitioner in Habeas Corpus 2009. When he made sure only he was assigned the Post-Conviction Habeas Corpus Review "**[HE WAS THE SUBJECT OF]**" in direct violation of Judicial misconduct **(ABA Code of Judicial Conduct Canon 3€ on Prejudice Violation of 14th Amendment and Professional Standards of Bench and Bar.)** Which is also misconduct violation of ***Penal Code 859 (c). See [Fuller vs. Superior Court (2004) 125 CA 4th 623, 23 CR 3d 204.)*** Judge Frawley denied Writ of Relief. That he was the Judge and SUBJECT OF THE MISCONDUCT OF THE TRIAL CASE HE PRESIDED OVER… (Jury Trial). "While he never cared to hear my motions!" **(Then Judge Frawley was reassigned my case again and denied it, "[again]," so I did a Writ of Prejudice/Mandate leading to this new habeas corpus for justice!**

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME	: JANUARY 4, 2018	DEPT. NO	: 47
JUDGE	: DAVID DE ALBA, Presiding Judge	CLERK	:
REPORTER	: NONE	BAILIFF	: NONE
		PRESENT:	

IN RE DANIEL BORDEN

Nature of Proceedings: - PETITION FOR COMPLAINT FOR PREJUDICE - **ORDER**

The court has received from petitioner Daniel Borden a "Petition for Complaint for Prejudice" that petitioner claims is related to Sacramento County Superior Court Case Nos. 18HC00433 and 07F04303. In the petition, he complains about the denial of relief in these matters by both this court and the Third District Court of Appeal.

The "Petition for Complaint for Prejudice" is not a cognizable action in this court. It contains no prayer for relief and in part challenges actions taken by a higher court than this court, which this court may not address. As such, it will not be construed as any other type of pleading that is cognizable in this court, and the clerk of the court is hereby DIRECTED to return the "Petition for Complaint for Prejudice" to petitioner.

Dated: 1/4/18

Honorable DAVID DE ALBA, Presiding Judge,
Judge of the Superior Court of California,
County of Sacramento

BOOK	:	47
PAGE	:	
DATE	:	JANUARY 4, 2018
CASE NO.	:	17HC00433 / 07F04303
CASE TITLE	:	IN RE DANIEL BORDEN

Superior Court of California,
County of Sacramento

BY: N. SMITH,
Deputy Clerk

ZIMAIN

APPENDIX "D"

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