

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 26 2021

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

DAVID B. PORTEE,

Petitioner-Appellant,

v.

CRAIG KOENIG, Acting Warden,

Respondent-Appellee.

No. 20-15104

D.C. No. 3:19-cv-02948-JD
Northern District of California,
San Francisco

ORDER

Before: CHRISTEN and WATFORD, Circuit Judges.

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.

APPENDIX B

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID B. PORTEE,
Petitioner,
v.
KOENIG,
Respondent.

Case No. 19-cv-02948-JD

ORDER OF DISMISSAL

Petitioner, a California prisoner, proceeds with a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The original petition was dismissed with leave to amend and petitioner has filed an amended petition.

DISCUSSION

STANDARD OF REVIEW

The Court may consider a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975). Habeas corpus petitions must meet heightened pleading requirements. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). An application for a federal writ of habeas corpus filed by a prisoner who is in state custody pursuant to a judgment of a state court must “specify all the grounds for relief available to the petitioner ... [and] state the facts supporting each ground.” Rule 2(c) of the Rules Governing § 2254 Cases, 28 U.S.C. § 2254. “[N]otice’ pleading is not sufficient, for the petition is expected to state facts that point to a ‘real possibility

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1 of constitutional error.” Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d
2 688, 689 (1st Cir. 1970)).

3 **LEGAL CLAIM**

4 Petitioner was convicted in 1982 and sentenced to life in prison. Am. Pet. at 1. In the
5 original habeas petition, the main argument was that the judges involved with various events in
6 petitioner’s case in 1981 -- his arrest warrant, a search warrant, and a preliminary hearing -- did
7 not have proper oaths of office in place. This was, on its face, a highly doubtful claim, but the
8 Court determined in any event that it appeared to be successive or untimely. The petition was
9 dismissed with leave to amend to address that issue, which is now taken up here.

10 “A claim presented in a second or successive habeas corpus application under section 2254
11 that was not presented in a prior application shall be dismissed . . .” 28 U.S.C. § 2244(b)(2). This
12 is the case unless,

13 (A) the applicant shows that the claim relies on a new rule of
14 constitutional law, made retroactive to cases on collateral review by
the Supreme Court, that was previously unavailable; or

15 (B) (i) the factual predicate for the claim could not have been
discovered previously through the exercise of due diligence; and

16 (ii) the facts underlying the claim, if proven and viewed in
17 light of the evidence as a whole, would be sufficient to establish by
clear and convincing evidence that, but for constitutional error, no
reasonable factfinder would have found the applicant guilty of the
underlying offense.

18 28 U.S.C. § 2244(b)(2).

19 “Before a second or successive application permitted by this section is filed in the district
20 court, the applicant shall move in the appropriate court of appeals for an order authorizing the
21 district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A).

22 The Antiterrorism and Effective Death Penalty Act of 1996, which became law on April
23 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of habeas corpus
24 filed by state prisoners. Petitions filed by prisoners challenging noncapital state convictions or
25 sentences must be filed within one year of the latest of the date on which: (A) the judgment
26 became final after the conclusion of direct review or the time passed for seeking direct review; (B)
27 an impediment to filing an application created by unconstitutional state action was removed, if
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1 such action prevented petitioner from filing; (C) the constitutional right asserted was recognized
2 by the Supreme Court, if the right was newly recognized by the Supreme Court and made
3 retroactive to cases on collateral review; or (D) the factual predicate of the claim could have been
4 discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). A prisoner with a state
5 conviction finalized before April 24, 1996, had until April 24, 1997, to file a federal habeas
6 petition on time. *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001).

7 Petitioner says that the petition is timely and not successive because he recently discovered
8 that the judges involved in his case in 1981 did not have oaths of office filed with the Secretary of
9 State. The point is not well taken. To start, petitioner has not proffered any evidence showing the
10 lack of a proper oath. At most, he says he personally hasn't seen what he considers to be
11 appropriate documentation of the oaths. That is not evidence. Moreover, the facts relevant to the
12 petition date back to 1981 or before. It is not at clear how any of this is, or could ever be deemed,
13 new.

14 That is enough to dismiss the case with prejudice. The Court also notes that, even if the
15 petition were proper, it fails to state a viable claim for relief. Petitioner's argument that there was
16 an error under state law does not entitle him to relief because the state courts already denied this
17 claim. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (a federal habeas court cannot
18 reexamine a state court's interpretation and application of state law).

19 **CONCLUSION**

20 The case is **DISMISSED** and the Clerk is requested to close the file. The Court declines
21 to issue a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

22 **IT IS SO ORDERED.**

23 Dated: January 6, 2020

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27 _____
28 JAMES DONATO
United States District Judge

APPENDIX C

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

**Department 20, Honorable Carrie Zepeda
for**

Department 19, Honorable Peter H. Kirwan, Presiding

Malanie Bueno, Courtroom Clerk
Court Reporter: SEE NOTE BELOW
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2320

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

LAW AND MOTION TENTATIVE RULINGS

DATE: April 17, 2018 TIME: 9 A.M.

**PLEASE NOTE: EFFECTIVE 7-24-17, THE COURT WILL NO
LONGER BE PROVIDING COURT REPORTERS. IF YOU WANT A
COURT REPORTER AT YOUR HEARING, ALL PARTIES MUST
JOINTLY AGREE AND A STIPULATION AND APPOINTMENT MUST
BE COMPLETED, SEE FORM CIV-5063**

**THE COURT WILL PREPARE THE ORDER UNLESS STATED
OTHERWISE BELOW**

TROUBLESHOOTING TENTATIVE RULINGS

If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. If you fail to do either of these, your browser will pull up old information from old cookies even after the tentative rulings have been posted.

LINE #	CASE #	CASE TITLE	RULING
<u>LINE 1</u>	16cv295764	TX Trading vs. Jack Xu, et al	Off Calendar
<u>LINE 2</u>	16cv295764	TX Trading vs. Jack Xu, et al	Off Calendar
<u>LINE 3</u>	16cv295764	TX Trading vs. Jack Xu, et al	Off Calendar
<u>LINE 4</u>	16cv300503	David Portee vs. Fred Lucero, et al	Click on Line 4 for ruling.
<u>LINE 5</u>	16cv300503	David Portee vs. Fred Lucero, et al	Click on Line 5 for ruling.
<u>LINE 6</u>	17cv317308	Pacific Construction & Design, Inc vs. Nunez General Contractors, Inc., et al	Defendants Nunez General contractors and Enrique Nunez Covarrubias' Demurrer to the Complaint and Motion for Judicial Notice are unopposed and GRANTED. Plaintiff shall have 20 days leave to amend from the date of service of the order.

Calendar Line 4

Case No. 16 CV 3000503

David Portee v. Fred Lucero, et al

The Honorable Defendants Fred S. Lucero, John A. Flaherty and Leonard P. Edwards filed a demurrer to Plaintiff's complaint. Plaintiff David Portee did not file an opposition to the demurrer, but instead, filed a pleading entitled, "Plaintiff, David Portee's Notice of Motions: Request for Extension of time to File Objections to Defendants' Notice of Demurrer by Defendants Judge Fred S. Lucero (Ret.), Judge Leonard P. Edwards (Ret), and Judge John A. Flaherty (ret.) Motion for Stay of Proceedings for a Determination Whether the "Judicial Defendants' were in Fact "Judicial Actors", without an Oath of Office or Bond, at the Time of Proceedings and Acts Taken in a Judicial Capacity." As set forth in the ruling on Line 5 herein, Plaintiff's Notice of Motion did not contain any memorandum of points and authorities and did not address the issues or law related to a request for extension of time or to stay the proceedings. Furthermore, the Notice of Motion did not address the arguments raised in the demurrer, such as the failure to comply with the Government Claims Act or statute of limitations. Accordingly, the court determines that Defendants' Demurrer is unopposed and is GRANTED without leave to amend.

APPENDIX D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

COPY

DAVID B. PORTEE,
Petitioner,

v.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent;
FRED LUCERO,
Real Party in Interest.

H046415
Santa Clara County Super. Ct. No. CV300503

BY THE COURT:

The petition for writ of mandate or other appropriate relief and the request for stay
are denied.

(Elia, Acting P.J., Bamattre-Manoukian, J. and Mihara, J. participated in this
decision.)

Date: 03/08/2019



Acting P.J.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

David Bernard Britee

Date *May 4, 2021*