

**FILED**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUG 18 2020

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

GUILLERMO VERA,

No. 20-55767

Petitioner-Appellant,

D.C. No. 2:18-cv-07634-JAK-ADS  
Central District of California,  
Los Angeles

v.

STATE OF CALIFORNIA; et al.,

ORDER

Respondents-Appellees.

Before: SCHROEDER and GRABER, Circuit Judges.

The request for a certificate of appealability is denied because the notice of appeal was not timely filed. *See* 28 U.S.C. §§ 2107, 2253(c)(2).

Any pending motions are denied as moot.

**DENIED.**



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G. MEMO VERA,

Case No. 2:18-07634 JAK (ADS)

Petitioner,

V.

13 || CHRISTIAN PFEIFFER, Warden,

ORDER ACCEPTING  
REPORT AND RECOMMENDATION OF  
UNITED STATES MAGISTRATE JUDGE

### Respondent.

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition and all the

records and files herein, along with the Report and Recommendation dated May 8, 2019

[Dkt. No. 26], of the assigned United States Magistrate Judge. Further, the Court has

engaged in a de novo review of those portions of the Report and Recommendation to

which objections have been made.

Accordingly, IT IS HEREBY

Accordingly, IT IS HEREBY ORDERED:

1. The United States Magistrate Judge's Report and Recommendation [Dkt. No. ]

No. 26] is accepted;

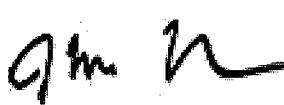
2. The Petition is dismissed with prejudice; and

1           3. Judgment is to be entered accordingly.

2

3 DATED: September 5, 2019

4



---

JOHN A. KRONSTADT  
United States District Judge

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G. MEMO VERA,

Case No. 2:18-07634 JAK (ADS)

Petitioner,

v.

REPORT AND RECOMMENDATION OF  
UNITED STATES MAGISTRATE JUDGE

CHRISTIAN PFEIFFER, Warden,

Respondent.

This Report and Recommendation is submitted to the Honorable John A.

Kronstadt, United States District Judge, pursuant to 28 U.S.C. § 636 and General

Order 05-07 of the United States District Court for the Central District of California.

**I. INTRODUCTION**

Pending before the Court is a Petition for Writ of Habeas Corpus by a Person in State Custody (“Petition”) filed by Petitioner G. Memo Vera, a California state prisoner. The Respondent, Christian Pfeiffer, Warden, filed a Motion to Dismiss the Petition for Writ of Habeas Corpus (“Motion to Dismiss”) on the basis that Petitioner is no longer in

1 custody for the conviction he is challenging in this Petition.<sup>1</sup> Additionally, Respondent  
2 argues that the Petition is untimely, fails to state a cognizable claim, and raises several  
3 unexhausted claims. After reviewing the Petition, the Motion to Dismiss, Petitioner's  
4 Opposition to the Motion to Dismiss, and the lodged records, the Court agrees with  
5 Respondent that the Petitioner is not entitled to habeas relief. For the following  
6 reasons, the Court recommends granting the Motion to Dismiss and dismissing the  
7 Petition with prejudice.

8 **II. RELEVANT BACKGROUND**

9 **A. State Court Proceedings**

10 On December 28, 1982, in Los Angeles County Superior Court, Petitioner pled  
11 guilty to robbery (Case No. A384002). [Dkt. No. 18-1, LD 1]. In January 1983, the court  
12 sentenced him to three years in prison. [Id.]. Petitioner did not appeal his conviction.  
13 See [Dkt. No. 1, p. 3].

14 On September 24, 1997, a Tulare County Superior Court jury convicted Petitioner  
15 of second-degree murder and assault with a deadly weapon causing great bodily injury  
16 (Case No. 39282). [Dkt. No. 18-2, LD 2].<sup>2</sup> After determining that Petitioner had a prior  
17 "strike" under California's Three Strikes law (presumably, the robbery conviction he  
18 suffered in 1982), the court sentenced Petitioner to 30 years to life in prison. [Dkt.  
19 Nos. 18-2, 18-3, LDs 2, 3]. Petitioner appealed the conviction, but the California Court  
20  
21

22 <sup>1</sup> Christian Pfeiffer, Acting Warden of Kern Valley State Prison, where Petitioner is now  
23 incarcerated, is substituted in as Respondent pursuant to Fed. R. Civ. P. 25(d).

24 <sup>2</sup> All citations to electronically-filed documents refer to the CM/ECF pagination.

1 of Appeal denied his appeal and the California Supreme Court rejected his petition for  
2 review summarily. [Dkt. Nos. 18-4, 18-5, LDs 4, 5].

3 In June 2015, Petitioner filed a petition to recall or modify his sentence in the Los  
4 Angeles County Superior Court, arguing that California's Proposition 47 and Penal Code  
5 § 1170.18 allowed his 1982 prior robbery conviction to be reclassified as a misdemeanor  
6 and no longer a strike.<sup>3</sup> [Dkt. No. 18-6, LD 6, pp. 8, 14-16]. The Superior Court denied  
7 his petition, finding that robbery was "not eligible for relief under the provisions." [Id.,  
8 p. 12].

9 In December 2017, Petitioner filed a petition for writ of mandate in the California  
10 Court of Appeal, claiming that he was entitled to have his 1982 robbery conviction  
11 reduced to a misdemeanor pursuant to Proposition 47. [Id., pp. 1-7]. That same month,  
12 the state appellate court denied the petition summarily. [Dkt. 18-7, LD 7].

13 Petitioner then filed a petition for writ of habeas corpus in the California  
14 Supreme Court on February 22, 2018, arguing that Proposition 47 entitled him to have  
15 his 1982 robbery conviction reduced to a misdemeanor and to be considered for parole  
16 eligibility. [Dkt. No. 18-8, LD 8]. On May 16, 2018, the California Supreme Court  
17 denied his petition. [Dkt. No. 18-9, LD 9].

18

19

20

21

---

3 In November 2014, California voters approved Proposition 47, codified as California  
22 Penal Code § 1170.18, which reclassified some felony drug possession and theft  
23 convictions as misdemeanors and allowed resentencing for prisoners currently serving a  
sentence for any of the offenses that the initiative reduced to misdemeanors. See Shell  
v. Rackley, 2017 WL 3021067, at \*1 (S.D. Cal. Jul. 17, 2017).

24

1                   **B. Federal Court Proceedings**

2                   On August 9, 2018, Petitioner constructively filed the instant habeas Petition  
3 pursuant to 28 U.S.C. § 2254.<sup>4</sup> [Dkt. No. 1]. In this habeas petition, Petitioner raises the  
4 following four grounds for relief:

5                   1.       Petitioner is entitled to relief from his plea to a 1982 robbery conviction  
6 under Proposition 47;

7                   2.       Petitioner is entitled to parole consideration because the “retroactive  
8 effect” of the 1982 robbery plea agreement increased the penalty of his current  
9 conviction;

10                  3.       Petitioner should be allowed to withdraw his plea of guilty to the 1982  
11 robbery; and

12                  4.       Petitioner was denied a full and fair evidentiary hearing in state court  
13 regarding his Proposition 47 claims. [Dkt. No. 1, pp. 4-6].

14                  On January 7, 2019, Respondent moved to dismiss the Petition because  
15 Petitioner is no longer in custody for the conviction he is challenging and because the  
16 Petition is untimely, fails to state a cognizable claim, and raises several unexhausted  
17

18                  4 It appears that Petitioner mistakenly filled out the form petition for a person in federal  
19 custody (28 U.S.C. § 2241), rather than the form petition for a person in state custody  
20 (28 U.S.C. § 2254). [See Dkt. No. 1]. The parties agree, however, that Petitioner is  
21 currently being held in custody pursuant to a state court judgment and conviction.  
22 Therefore, the Court has construed the filing as a habeas petition seeking relief pursuant  
23 to 28 U.S.C. § 2254. See White v. Lambert, 370 F.3d 1002, 1006-07 (9th Cir. 2004)  
24 (holding that the general grant of habeas authority in § 2241 is available for state  
prisoners who are not in custody pursuant to a state court judgment, such as a pretrial  
detainee, while a petition under § 2254 is the appropriate habeas procedure for  
prisoners convicted and in custody pursuant to a state court judgment.), overruled on  
other grounds by Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010).

1 claims. [Dkt. No. 17]. Respondent opposes the motion, arguing that constitutional due  
2 process and fairness concerns allow the court to consider his claims on their merits.  
3 [Dkt. No. 24, pp. 1-12].<sup>5</sup>

4 Respondent's Motion to Dismiss is now fully briefed and ready for decision.

5 **III. THE COURT LACKS JURISDICTION OVER THE PETITION**

6 This Court's habeas jurisdiction requires that a petitioner be "in custody" under  
7 the conviction or sentence under attack at the time his federal petition is filed. Maleng  
8 v. Cook, 490 U.S. 488, 490-91 (1989); Allen v. State of Oregon, 153 F.3d 1046, 1048 (9th  
9 Cir. 1998). A habeas petitioner is not "in custody" under a conviction after the sentence  
10 imposed for it has fully expired, even though it may possibly be used, or is in fact used,  
11 to enhance a subsequent sentence. Maleng, 490 U.S. at 492; see also Alaimalo v. United  
12 States, 645 F.3d 1042, 1060 (9th Cir. 2011) ("[T]he Supreme Court [in Maleng] held that  
13 a defendant who had completed serving his sentence could not obtain habeas corpus  
14 relief with respect to that conviction merely because it could possibly be used to enhance  
15 his sentence if he committed a subsequent crime . . . ."). "[O]nce a state conviction is no  
16 longer open to direct or collateral attack in its own right because the defendant failed to

17  
18 <sup>5</sup> Petitioner has filed several motions, as follows: Motion for Intervention for Petitioner's  
19 Cause of Action under Rule 24, seeking to allow the Mexican Consulate to intervene in  
20 this action [Dkt. No. 14]; Complaint for Sanctions and a Permanent Injunction pursuant  
21 to Rule 65, contending that he was subjected to unlawful misconduct by jail personnel  
22 while in prison [Dkt. No. 15]; Motion for Transcripts, requesting all discovery pertaining  
23 to his 1982 robbery conviction [Dkt. No. 19]; and Motion for Rule 11 Sanctions, claiming  
24 that Respondent has made frivolous arguments and filings [Dkt. No. 20]. Each of these  
motions is legally baseless and without proper evidentiary support. Accordingly, the  
motions are denied. To the extent that Petitioner is attempting to raise a civil rights  
claim based on alleged mistreatment by jail personnel, Petitioner cannot challenge the  
conditions of his confinement in this action under 28 U.S.C. § 2254. Rather, a civil  
rights action under 42 U.S.C. § 1983 would be the proper method for such a complaint.

1 pursue those remedies while they were available (or because the defendant did so  
2 unsuccessfully), the conviction may be regarded as conclusively valid.” Lackawanna  
3 County Dist. Attorney v. Coss, 532 U.S. 394, 403 (2001).

4 In this action, Petitioner is challenging his 1982 conviction for robbery pursuant  
5 to a guilty plea. Petitioner had long since served his three-year sentence for that crime  
6 when he filed the instant Petition in 2018. Instead, Petitioner is currently incarcerated  
7 pursuant to a 1997 conviction for murder and assault with a deadly weapon in which he  
8 received an indeterminate life sentence that was enhanced by his 1982 robbery  
9 conviction. The use of his 1982 conviction to enhance a subsequent sentence does not  
10 render Petitioner “in custody” to allow him to directly challenge the lawfulness of the  
11 1982 conviction in this proceeding. See Lackawanna, 532 U.S. at 402; Maleng, 490 U.S.  
12 at 491; see also Fisher v. Ventura County Sheriffs Narcotics Agency, 2014 WL 2772705,  
13 at \*6 (C.D. Cal. June 18, 2014) (“Petitioner may not challenge the 1999 Conviction  
14 directly, because he does not meet the ‘in custody’ requirement and subject-matter  
15 jurisdiction is lacking. He also may not challenge the 1999 Conviction indirectly  
16 through an attack on the sentence imposed on him in Kern County in 2012, because the  
17 Lackawanna rule prohibits him from doing so. These two defects are fundamental and  
18 not rectifiable.”).<sup>6</sup> Accordingly, this Court lacks jurisdiction to grant Petitioner relief.

19

---

20 <sup>6</sup> The Lackawanna Court identified three exceptions to the rule: (1) if the petitioner  
21 challenges the enhanced sentence by claiming that a state conviction used to enhance  
22 the sentence is invalid because counsel was not appointed, in violation of the Sixth  
23 Amendment; (2) if federal habeas review is “effectively the first and only forum available  
24 for review of the prior conviction”; and (3) if the petitioner can present compelling  
evidence of actual innocence. Lackawanna, 532 U.S. at 404-06. Petitioner has not  
demonstrated that any of these exceptions apply in his case. It appears that Petitioner  
was represented by counsel in both his 1982 and 1997 convictions. See [Dkt. Nos. 1, 2].  
Further, Petitioner has not explained why he could not have challenged the validity of

1 **IV. PETITIONER'S CLAIMS ARE NOT COGNIZABLE**

2 Even were the Court to have jurisdiction over Petitioner's claims, they would not  
3 be cognizable on federal habeas review. It is well established that federal habeas review  
4 is available only for violations of the United States Constitution or other federal law, and  
5 not for state law sentencing errors. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)  
6 ("[I]t is not the province of a federal habeas court to reexamine state-court  
7 determinations on state-law questions. In conducting habeas review, a federal court is  
8 limited to deciding whether a conviction violated the Constitution, laws, or treaties of  
9 the United States."); see also Souch v. Schaivo, 289 F.3d 616, 622-23 (9th Cir. 2002)  
10 (finding state prisoner's challenge to trial court's exercise of discretion under state  
11 sentencing law failed to state federal habeas claim); Watts v. Bonneville, 879 F.2d 685,  
12 687 (9th Cir. 1989) (holding that sentencing error claim under California Penal Code  
13 § 654 was not cognizable on federal habeas review); Miller v. Vasquez, 868 F.2d 1116,  
14 1118-19 (9th Cir. 1989) (holding that federal reviewing court need not address  
15 petitioner's claim that the trial court improperly applied "state sentencing law").

16 Here, the essence of all of Petitioner's claims is that the state courts erred in  
17 refusing to reduce his 1982 robbery conviction from a felony to a misdemeanor under  
18 California's Proposition 47. That claim is not cognizable on federal habeas review. See,  
19 e.g., Orozco v. California Dept. of Corrections, 2017 WL 6626637, at \*3 (C.D. Cal. Dec.  
20 28, 2017); McKinney v. Pfeiffer, 2017 WL 1078441, at \*4 (C.D. Cal. Jan. 11, 2017). The  
21 fact that Petitioner attempts to characterize his Proposition 47 claims as a violation of

22  
23 his 1982 guilty plea by filing an appeal in state court. Finally, Petitioner has not  
24 presented any evidence, let alone compelling evidence, of his innocence in the robbery.

1 his federal constitutional rights does not alter the Court's conclusion because the crux of  
2 his claims remains the same—a challenge to state sentencing laws. See Langford v. Day,  
3 110 F.3d 1380, 1389 (9th Cir. 1997) (as modified) (holding that a petitioner may not  
4 "transform a state-law issue into a federal one merely by asserting a violation of due  
5 process"); see also Gryger v. Burke, 334 U.S. 728, 731 (1948) (The Court "cannot treat a  
6 mere error of state law, if one occurred, as a denial of due process; otherwise, every  
7 erroneous decision by a state court on state law would come here as a federal  
8 constitutional question.").

9 Finally, to the extent that the California courts determined that Petitioner's  
10 robbery offense was ineligible for reclassification from a felony to a misdemeanor under  
11 Proposition 47, a federal habeas court is bound by the state court's interpretation of  
12 state law. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam). Accordingly,  
13 the Court is foreclosed from granting Petitioner relief.<sup>7</sup>

14 **V. CERTIFICATE OF APPEALABILITY**

15 The Court finds that Petitioner has not made a "substantial showing of the denial  
16 of a constitutional right" or "demonstrate[d] that reasonable jurists would find the  
17 district court's assessment of the constitutional claims debatable or wrong." Slack v.  
18 McDaniel, 529 U.S. 473, 484 (2000). Thus, it is recommended that a certificate of  
19 appealability be denied.

20

21

22 <sup>7</sup> The Court need not and will not consider Respondent's claims that the Petition is  
23 untimely and that Grounds Three and Four raise unexhausted claims because the Court  
24 has concluded that it lacks jurisdiction to consider the Petition and that all of claims  
therein raise non-cognizable issues.

## VI. CONCLUSION

For these reasons, it is recommended that the District Court issue an Order, as follows: (1) approving and accepting this Report and Recommendation; (2) granting Respondent's Motion to Dismiss the Petition; (3) directing that Judgment be entered dismissing this action with prejudice; and (4) denying a certificate of appealability.

Dated: May 08, 2019

/s/ Autumn D. Spaeth  
HONORABLE AUTUMN D. SPAETH  
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

NOV 2 2020

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

GUILLERMO VERA,

Petitioner-Appellant,

v.

STATE OF CALIFORNIA; et al.,

Respondents-Appellees.

No. 20-55767

D.C. No. 2:18-cv-07634-JAK-ADS  
Central District of California,  
Los Angeles

ORDER

Before: TALLMAN and LEE, Circuit Judges.

Appellant's motion for a second extension of time in which to file a motion for reconsideration (Docket Entry No. 9) is granted in part. Any motion for reconsideration is due by December 4, 2020. No further extensions of time will be granted.

Appellant's motion for a court order to gain access to research (Docket Entry No. 7) is denied.

Appellant's request for copies of documents filed in the district court (Docket Entry No. 6) is denied without prejudice to renewing his request directly with the district court.

22  
19-21

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

DEC 15 2020

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

GUILLERMO VERA,

No. 20-55767

Petitioner-Appellant,

D.C. No. 2:18-cv-07634-JAK-ADS  
Central District of California,  
Los Angeles

v.

STATE OF CALIFORNIA; et al.,

ORDER

Respondents-Appellees.

Before: BYBEE and HURWITZ, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 13) is denied. *See*  
9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

20

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