UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 1:20-CV-00411-NONE-JDP

STANDING ORDER IN LIGHT OF ONGOING JUDICIAL EMERGENCY IN THE EASTERN DISTRICT OF CALIFORNIA

ROGER TOWERS,
Plaintiff
v.
SUPERIOR COURT, COUNTY OF STANISLAUS,
Defendant.

The judges of the United States District Court for the Eastern District of California have long labored under one of the heaviest caseloads in the nation even when operating with a full complement of six authorized District Judges.[1] Each of those six District Judges has regularly carried a caseload

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[1] For over a decade the Judicial Conference of the United States has recommended that this district be authorized up to six additional judgeships. However, those recommendations have gone unacted upon. This is the case despite the fact that since the last new District Judgeship was created in the Eastern District in 1978, the population of this district has grown from 2.5 million to over 8 million people and that the Northern District of California, with a similar population, operates with 14 authorized District Judges

double the nationwide average caseload for District Judges. Even while laboring under this burden, the judges of this court have annually ranked among the top 10 districts in the country in cases terminated per judgeship for over 20 years. See Letter regarding Caseload Crisis from the Judges of the Eastern District of California (June 19, 2018), 23 http://www.caed.uscourts.gov/CAEDnew/index.cfm/news/important-letter-re-caseload-crisis/. On 24 December 17, 2019, District Judge Morrison C. England took Senior status. On December 31, 2019, Senior District Judge Garland E. Burrell, Jr. assumed inactive Senior status. On February 2, 2020, District Judge Lawrence J. O'Neill will assume inactive Senior status.[2] As a result of these long anticipated events, the shortfall in judicial resources will seriously hinder the administration of justice throughout this district, but the impact will be particularly acute in Fresno, where the undersigned will now be presiding over all criminal and civil cases previously assigned to Judge O'Neill as well as those already pending before the undersigned. As of the date of this order, this amounts to roughly 1,050 civil actions and 625 criminal defendants. Until two candidates are nominated and confirmed to fill this court's two vacant authorized district judgeships, this situation can only be expected to get progressively worse.

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[2] In short, a Senior District Judge is one who has retired from regular active service, usually based on age 26 and length of service, but continues to preside over cases of a nature and in an amount as described in 28 U.S.C. § 371(e). A Senior District Judge taking inactive status is one who has ceased to perform such work

The gravity of this problem is such that no action or set of actions undertaken by this court can reasonably be expected to alleviate it. Nonetheless, this order will advise litigants and their counsel of the temporary procedures that will be put in place for the duration of this judicial emergency in cases over which the undersigned is presiding. What follows will in some respects be contrary to the undersigned's default Standing Order in Civil Actions,[3] and may also differ from the Local Rules of the Eastern District of 13 California. To the extent such a conflict exists, the undersigned hereby invokes the court's authority under 14 Local Rule 102(d) to issue orders supplementary or contrary to the Local Rules in the interests of justice and 15 case management.

A. DESIGNATION OF CIVIL CASES

As of February 3, 2020, all civil cases previously assigned to Judge O'Neill, and all newly filed cases 18 that will be assigned to his future replacement, will be unassigned. Those cases will bear the designation "NONE" as the assigned district judge and will continue to bear the initials of the assigned magistrate judge. Until new judges arrive, the undersigned will preside as the district judge in the cases so designated. Judge O'Neill's chambers staff will remain in place for seven months following his departure from the court. Accordingly, his remaining staff will continue to work on the cases bearing the "NONE" designation and Courtroom Deputy Irma Munoz (559–499–5682; imunoz@caed.uscourts.gov)

[3] The undersigned's standing order in civil cases is available at http://www.caed.uscourts.gov/caednew/assets/File/DAD%20Standing%20Order052019.pdf

will continue to be the contact person with respect to any questions regarding those cases. Proposed orders in those cases are to be sent to noneorders@caed.uscourts.gov. Finally, any hearings or trials before the undersigned in cases bearing the "NONE" designation will continue to be held in Judge O'Neill's former courtroom, Courtroom #4 on the 7th Floor at 2500 Tulare Street in Fresno, California.

CIVIL LAW AND MOTION

It has been the strong preference of the undersigned over the past twenty-three years to hear oral argument on all civil motions. In the undersigned's experience, doing so allows the court to more fully grasp the parties' positions and permits the parties to address the court's concerns without the need for supplemental briefing. However, given the judicial emergency now faced by this court, such hearings on civil law and motion matters will no longer be feasible. Accordingly, all motions filed before the undersigned in civil cases will be deemed submitted upon the record and briefs pursuant to Local Rule 230(g). The hearing date chosen by the moving party will nonetheless govern the opposition and reply filing deadlines pursuant to Local Rule 230(c). In cases bearing the "DAD" designation, the noticed hearing dates will remain the first and third Tuesdays of each month. In cases designated as "NONE," the noticed hearing dates may be any Tuesday through Friday. In the unlikely event that the Court determines a hearing would be helpful and feasible, the court will re-schedule a hearing date in accordance with its availability. In addition to the motions already assigned to magistrate judges by

operation of Local Rule 302(c), the undersigned now orders that the following categories of motions in cases bearing "DAD" and "NONE" designations shall be noticed for hearing before the assigned magistrate judge:

1. Motions seeking the appointment of a guardian ad litem;
2. Motions for class certification and decertification pursuant to Federal Rule of Civil Procedure 23;
3. Motions seeking preliminary or final approval of collective or class action settlements; and
4. Motions to approve minors' compromises.[4]

The undersigned will surely refer other motions to the assigned magistrate judge for the issuance of findings and recommendations by separate orders in particular cases.

CIVIL TRIALS

In the two civil caseloads over which the undersigned will be presiding for the duration of this judicial emergency, there are currently trials scheduled through the end of 2021. Given the enormous criminal caseload that will be pending before the undersigned and based upon the reasonable assumption that at least some of those criminal cases will proceed to trial, it is unlikely that those civil cases will be able to proceed to trial on the

[4] Magistrate judges may resolve motions seeking the appointment of a guardian ad litem by way of order, while all other motions may be resolved by issuance of findings and recommendations. See 28 U.S.C. § 636(b)(1)(A).

currently scheduled date.[5] Thus, the setting of new trial dates in civil cases would be purely illusory and merely add to the court's administrative burden of vacating and re-setting dates for trials that will not take place in any event. **Accordingly, for the duration of this judicial emergency and absent further order of this court in light of statutory requirements or in response to demonstrated exigent circumstances, no new trial dates will be scheduled in civil cases assigned to "DAD" and "NONE" over which the undersigned is presiding.**[6] As such, scheduling orders issued in civil cases over which the undersigned is presiding will not include a trial date. Rather, the final pretrial conference will be the last date to be scheduled.[7]

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[5] Even in those instances where a trial date has been set, such trial dates will be subject to vacatur with little to no advance notice due to the anticipated press of proceedings related to criminal trials before this court, which have statutory priority over civil trials. In any civil action that is able to be tried before the undersigned during the duration of this judicial emergency, the trial will be conducted beginning at 8:30 a.m. Tuesday through Thursday. The court will have calendars for criminal cases bearing a "DAD" assignment on Monday at 10:00 a.m. and for those criminal cases bearing the "NONE" designation on Friday at 8:30 a.m.

[6] Any party that believes exigent or extraordinary circumstances justify an exception to this order in their case may file a motion seeking the setting of a trial date. Such motions shall not exceed five pages in length and must establish truly extraordinary circumstances. Even where such a showing is made, the parties are forewarned that the undersigned may simply be unable to accommodate them in light of the court's criminal caseload.

[7] Final Pretrial Conference dates may be later vacated and rescheduled depending on the court's ability to rule on dispositive motions that are filed. Moreover, in those "NONE" and "DAD" designated civil cases with trial dates, the parties

Particularly in light of this judicial emergency, parties in all civil cases before the undersigned are reminded of their option to consent to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c). The magistrate judges of this court are highly skilled, experienced trial judges. Moreover, because magistrate judges cannot preside over felony criminal trials, trial dates in civil cases can be set before the assigned magistrate judge with a strong likelihood that the trial will commence on the date scheduled.

CONCLUSION

These are uncharted waters for this court. The emergency procedures announced above are being implemented reluctantly. They are not, in the undersigned's view, conducive to the fair administration of justice. However, the court has been placed in an untenable position in which it simply has no choice. There will likely be unforeseen consequences due to the implementation of these emergency procedures and the court will therefore amend this order as necessary.

DATED: May 15, 2020

/S/_____
DALE A. DROZD
U.S. DISTRICT COURT JUDGE

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are hereby ordered not to file any pretrial motions in limine prior to the issuance of the Final Pretrial Order and to do so only in compliance with the deadlines set in that order.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 1:20-CV-00411-NONE-JDP

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS, DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT, DENYING PETITION FOR WRIT OF HABEAS CORPUS, DIRECTING CLERK OF COURT TO ASSIGN DISTRICT JUDGE AND CLOSE CASE, AND DECLINING TO ISSUE CERTIFICATE OF APPEALABILITY (Doc. Nos. 1, 19, 26)

ROGER TOWERS,
Plaintiff

v.

SUPERIOR COURT,
COUNTY OF STANISLAUS,
Respondent.

Petitioner Roger Towers, who is currently on probation following his conviction in state court, is proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) On October 29, 2018, petitioner pleaded nolo contendere in Stanislaus County Superior Court to misdemeanor possession of a firearm and ammunition in violation of a civil restraining order and was sentenced to four days in jail and thirty-six months of "informal" probation. (Id. at 1.) When the pending petition for

federal habeas relief was filed in this court on March 20, 2020, the matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On April 1, 2021, the assigned magistrate judge issued findings and recommendations recommending that petitioner's motion for summary judgment be denied and that the habeas petition be denied on the merits. (Doc. Nos. 19, 26.) The pending findings and recommendations were served on petitioner at his address of record and contained notice that any objections thereto were to be filed within thirty (30) days of service. (Id. at 8.) On April 23, 2021, petitioner filed objections to the findings and recommendations. (Doc. No. 27.)

In his objections, petitioner first argues that his motion for summary judgment is necessary and appropriately brought. However, as explained in the findings and recommendations, "[b]ecause the Court's analysis of the merits of a habeas petition is equivalent to a summary judgment motion, '[m]otions for summary judgment are inappropriate in federal habeas cases.'" (See Doc. No. 26 at 5 (quoting *Rizzolo v. Puentes*, No. 1:19-cv-00290-SKO (HC), 2019 WL 1229772, at *1 (E.D. Cal. Mar. 15, 2019); *Johnson v. Siebel*, Case No. EDCV 15-277 CBM (AFM), 2015 WL 9664958, at *1 n.2 (C.D. Cal. Aug. 4, 2015)).) Second, in his pending petition, petitioner challenges the validity of the underlying state court issued restraining order, arguing that it violated his rights under the First and Fourteenth Amendments of the U.S. Constitution. (See Doc. Nos. 1 at 13; 27 at 2.) However, petitioner is not "in custody" as a result of that restraining order. Instead, he is currently on probation for possession of a firearm and ammunition in violation of the

restraining order. See 28 U.S.C. § 2254(a) (stating that a district court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . ."); *Rouse v. Plummer*, No. C 04-0276 JF (PR), 2006 WL 3507945, at *5 (N.D. Cal. Dec. 1, 2006) ("[B]ecause Petitioner is not 'in custody' as a result of the underlying restraining order, he cannot challenge the validity of that order."). The court can only consider challenges to petitioner's criminal conviction, but petitioner does not raise any such challenges here. Accordingly, the pending findings and recommendations correctly concluded that "[b]ecause [petitioner] is not 'in custody,' constructive or otherwise, as a result of the civil restraining order, he cannot challenge the validity of the restraining order in this habeas proceeding." (Doc. No. 26 at 6.)

Petitioner next argues that the magistrate judge erred in concluding that his nolo contendere plea bars habeas relief (Doc. No. 27 at 3). Contrary to petitioner's assertion, the magistrate judge did not recommend denial of the pending petition based solely on the nature of his plea. Rather, the magistrate judge correctly explained that, "to the extent [plaintiff] challenges his conviction for possession of a firearm and ammunition in violation of his civil protection order," any challenge to his nolo contendere plea is "limited to challenging the voluntary and intelligent character of the plea or his counsel's ineffectiveness in advising the petitioner to enter a plea," neither of which petitioner raises here. (Doc. No. 26 at 7 (citing *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).)

Finally, petitioner asserts that respondent's record is "both incomplete and fraudulent," specifically contending that respondent withheld

pages and deleted statements from petitioner's state habeas petitions and what he characterizes as "a fraudulent probation agreement." (Doc. No. 27 at 5.)

As noted in the findings and recommendations, however, petitioner provided the allegedly missing pages in his reply to respondent's answer and those documents are therefore before this court. (See Doc. Nos. 24 at 26–77; 26 at 7 n.5.)

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the 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 recommendations are supported by the record and by proper analysis.

Having determined that petitioner is not entitled to habeas relief, the court now turns to whether a certificate of appealability should issue. The federal rules governing habeas cases brought by state prisoners require a district court issuing an order denying a habeas petition to either grant or deny therein a certificate of appealability. See Rules Governing § 2254 Case, Rule 11(a). A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal, rather an appeal is only allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); see 28 U.S.C. § 2253(c)(1)(A) (permitting habeas appeals from state prisoners only with a certificate of appealability). A judge shall grant a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and the certificate must indicate which issues satisfy this standard, 28 U.S.C. § 2253(c)(3). In the present case, the court finds that reasonable jurists would not find the court's rejection of petitioner's claims to be debatable or conclude that

the petition should proceed further. Moreover, it appears at this time that any alleged error has been corrected by his release. Thus, the court declines to issue a certificate of appealability.

Accordingly:

1. The findings and recommendations issued on April 1, 2021 (Doc. No. 26), are adopted in full;
2. Petitioner's motion for summary judgment (Doc. No. 19) is denied;
3. The petition for writ of habeas corpus (Doc. No. 1) is dismissed;
4. The court declines to issue a certificate of appealability; and
5. The clerk of court is directed to assign a district judge to this case for the purpose of closing the case and then to close the case.

IT IS SO ORDERED.

Dated: June 18, 2021

/S/
DALE A. DROZD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. 1:20-CV-00411-NONE-JDP

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION (Doc. No. 31)

ROGER TOWERS,
Plaintiff

v.

SUPERIOR COURT,
COUNTY OF STANISLAUS,
Respondent.

Petitioner Roger Towers, who is currently on probation following his conviction in state court for possession of a firearm and ammunition in violation of a state court issued civil restraining order, is proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) On April 1, 2021, the assigned magistrate judge issued findings and recommendations recommending that petitioner's motion for summary judgment be denied and that his petition be denied on the merits. (Doc. No. 26.) These findings and recommendations were adopted by the undersigned and the case was closed. (Doc. Nos. 29, 30.) On June 25, 2021, petitioner filed the pending motion for reconsideration of the court's order adopting the findings and recommendations. (Doc. No. 31.) Petitioner appealed from the same order to the Ninth Circuit Court of Appeals on July 26, 2021. (Doc. No. 32.)

Federal Rule of Civil Procedure 60(b) governs the reconsideration of final orders of the district court. Rule 60(b) permits a district court to relieve a party from a final order or judgment for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). A motion under Rule 60(b) must be made within a reasonable time, typically "not more than one year after the judgment or order or the date of the proceeding." Id. Such a motion should not be granted "absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law," and it "may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (internal quotation marks and citations omitted); see also *Kona Enters., Inc. v. Estate of*

Bishop, 229 F. 3d 877, 890 (9th Cir. 2000) (noting that reconsideration should be granted "sparingly in the interests of finality and conservation of judicial resources"). Further, Local Rule 230(j) requires, in relevant part, that a movant show "what new or different facts or circumstances are claimed to exist which did not exist or were not shown upon such prior motion," "what other grounds exist for the motion," and "why the facts or circumstances were not shown at the time of the prior motion." Here, petitioner has not claimed in his pending motion that any of the grounds requiring reconsideration are present—such as fraud, new evidence, or mistake—nor has he presented any other reason that justifies the granting of relief. (See Doc. No. 31.) Rather, he merely reiterates the arguments raised in his previous filings with this court. (Compare id. with Doc. Nos. 1, 19, 27.) Petitioner again challenges the underlying state court issued restraining order in his habeas petition, but as previously explained, petitioner is not "in custody" as a result of that restraining order. (See Doc. Nos. 26 at 6–7, 29 at 2.) Instead, petitioner is on probation for possession of a firearm and ammunition in violation of that restraining order. As a result, the court can only consider challenges to petitioner's criminal conviction for violating the terms of the restraining order, but petitioner has not raised such challenges here. See 28 U.S.C. § 2254(a); *Rouse v. Plummer*, No. C 04-0276 JF (PR), 2006 WL 3507945, at *5 (N.D. Cal. Dec. 1, 2006) ("[B]ecause Petitioner is not 'in custody' as a result of the underlying restraining order, he cannot now challenge the validity of that restraining order . . . . Petitioner is currently on probation and in 'constructive custody' due to his criminal conviction for violating the terms of the

restraining order, and thus the Court may only consider challenges to his criminal conviction."). Finally, "to the extent [plaintiff] challenges his conviction for possession of a firearm and ammunition in violation of his civil protection order," any challenge to his nolo contendere plea is "limited to challenging the voluntary and intelligent character of the plea or his counsel's ineffectiveness in advising the petitioner to enter a plea," neither of which petitioner raises here. (Doc. Nos. 26 at 7, 29 at 3 (citing *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).) Accordingly, petitioner's motion for reconsideration (Doc. No. 31) is DENIED. This case shall remain closed and no further filings will be entertained in this closed case.

IT IS SO ORDERED.

Dated: July 30, 2021

/S/_____
DALE A. DROZD
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

No. 21-16236
D.C. No. 1:20-cv-00411-DAD-HBK
Eastern District of California, Fresno

ORDER

FILED
April 28, 2022
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROGER DAVID TOWERS,
Petitioner-Appellant,

v.

MIKE HAMASAKI, Chief Probation Officer of Stanislaus County,
Respondent-Appellee.

Before: GRABER AND TALLMAN, 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); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Any pending motions are denied as moot.
DENIED.

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

No. 21-16236
D.C. No. 1:20-cv-00411-DAD-HBK
Eastern District of California, Fresno

ORDER

FILED
May 24, 2022
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROGER DAVID TOWERS,
Petitioner-Appellant,

v.

MIKE HAMASAKI, Chief Probation Officer of Stanislaus County,
Respondent-Appellee.

Before: RAWLINSON and NGUYEN, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 7) is denied. See 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROGER TOWERS,

Petitioner,

v.

SUPERIOR COURT, COUNTY OF STANISLAUS,

Respondent.

Case No. 1:20-cv-00411-NONE-HBK

FINDINGS AND RECOMMENDATIONS TO DENY PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND DENY PETITION FOR WRIT OF HABEAS CORPUS[1]

OBJECTIONS DUE IN THIRTY DAYS

(Doc. Nos. 19, 1)

Petitioner Roger Towers, a state probationer, initiated this action by filing a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254. (Doc. No. 1). Before the court are petitioner's motion for summary judgment (Doc. No. 19), respondent's answer to the petition (Doc. No. 22) with the state court record in support (Doc. No. 23), and petitioner's reply. (Doc. No. 24). For the reasons set forth below, the court recommends denying the petition and denying petitioner's motion for summary judgment.

[1] This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2019).

I. BACKGROUND AND FACTS

Petitioner initiated this case on March 20, 2020 by filing the instant petition. (Doc. No. 1). On October 29, 2018, petitioner pled *nolo contendere* and was convicted of misdemeanor possession of a firearm and ammunition in violation of a civil restraining order lodged against him stemming from petitioner's behavior during public county hearings related to land use. (Doc. No. 1 at 1, 13); *see also San Joaquin Cty. Counsel's Office v. Towers*, No. C084030, 2018 WL 2424114, at *1–3 (Cal. Ct. App. May 30, 2018). On October 29, 2018, petitioner was sentenced to four-days in jail followed by 36 months' "informal" probation. (Doc. No. 1 at 1).

The petition raises two grounds for relief: (1) the civil restraining orders violated his First Amendment rights; and (2) the civil restraining orders violated his Fourteenth Amendment rights. (Doc. No. 1 at 4). The pertinent facts of the underlying proceedings, as summarized by the California Court of Appeal, which are presumed correct, are set forth below. *See* 28 U.S.C. § 2254(e)(1); *see also Crittenden v. Chappell*, 804 F.3d 998, 1010-11 (9th Cir. 2015).

> [Petitioner] Towers owns property in San Joaquin County (County) that is designated open space/resource conservation (OS/RC) in County's general plan. Beginning in 2003, Towers appeared at numerous public hearings relating to his property. Towers began making claims that the County community development department and its employee, K.S., were conspiring to intentionally misrepresent the general plan designation for his property, and that because of this misrepresentation, he was unable to develop his land.
>
> In 2003 or 2004, Towers attended a board of supervisors hearing and lunged at K.S. while making a loud, guttural noise, but was stopped by his wife's intervention from contact with K.S. . . .. Because of his behavior, a County staff member accompanied K.S. to her car after the meeting to ensure her safety.
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> In January 2010, Towers appeared at the board of supervisors meeting . . .. [H]e again verbally attacked K.S. and stated that she had personally and intentionally acted to harm him. K.S. was so fearful for her safety that she had a colleague follow her home from planning commission meetings many times after that.
>
> On September 29, 2016 . . . Towers spoke two times during [a planning commission hearing]. Both times he spoke he was intense, visibly shaking, red-faced, and appeared to some of those present to be more dangerous and threatening than on previous occasions. . .. Towers accused K.S. and A.S., [a consultant] of being liars and cheaters. Members of the community . . . thought Towers was going to attack [K.S.] during or after the hearing.

> On October 24, 2016, County Counsel filed a petition for workplace violence restraining order, pursuant to section 527.8 [against Towers][2]. The petition sought protection for K.S. and A.S. County Counsel moved for and received a temporary restraining order (TRO) pursuant to section 527.8 . . ..
>
> Prior to the hearing on the workplace violence restraining order, Towers moved on shortened time to change venue on the grounds he could not receive an impartial trial in San Joaquin County and that he is a resident of Stanislaus County. The trial court heard the change of venue motion, and found either San Joaquin or Stanislaus County would be appropriate venues, and referred the matter to the judicial council, who assigned a neutral judge . . . to hear the matter.
>
> [The trial court] heard testimony from members of the public . . ., in addition to the testimony of K.S., A.S., and Towers.
>
> [The trial court] granted the restraining order from the bench. The order . . . prohibited Towers from owning, possessing, having, buying or trying to buy, receiving or trying to receive, or in any other way getting guns, firearms, or ammunition.
>
> Towers moved to set aside the order on the ground it violated his First Amendment right to free speech. [The trial judge] denied the motion. Towers appealed from the restraining order.

(Doc. No. 23-1 at 2-4).

After denial, Towers sought habeas relief in the state superior, appellate, and supreme courts to no avail. (Doc. No. 1 at 2-3). Next, Towers sought relief through multiple civil suits in this court, arguing, *inter alia*, that the imposition of the civil restraining order violated his First Amendment right to free speech. (Doc. No. 22 at 11-12). Now, Towers seeks habeas relief from this court.

II. APPLICABLE LAW AND ANALYSIS

a. Jurisdiction

This court must first determine whether it has jurisdiction to consider the petition. Respondent argues petitioner does not meet the "in custody" requirement of § 2254(a) and submits this court lacks jurisdiction. *See* Doc. No. 22 at 13-14; 28 U.S.C. § 2254(a) (Federal habeas relief

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[2] California Code of Civil Procedure § 527.89(a) provides that "[a]ny employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an order after hearing on behalf of the employee."

is only available to 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."). Respondent contends that because there are no conditions of probation restraining petitioner's liberty he is not "in custody" for habeas purposes.

The court disagrees. Petitioner is in "constructive custody" because the custody requirement does not require physical confinement. *Maleng v. Cook*, 490 U.S. 488, 491 (1989). "[A] petitioner is in custody for the purposes of habeas jurisdiction while he remains on probation." *Chaker v. Crogan*, 428 F.3d 1215, 1219 (9th Cir. 2005) (finding habeas jurisdiction where a petitioner filed his habeas petition while on probation); *see also Robertson v. Pichon*, 849 F.3d 1173, 1177 (9th Cir. 2017) ("We have jurisdiction over [the petitioner's] appeal because he filed his petition while he was on probation.); *Meza v. Bonwell*, No. 1:19-cv-00919-DAD-SKO (HC), 2020 U.S. Dist. LEXIS 12003, at *2-3 (E.D. Cal. Jan. 23, 2020) ("[I]n the Ninth Circuit, probationary status alone satisfies the custody requirement"). Based on controlling precedent, respondent's claim that this court lacks jurisdiction because petitioner's probation does constitute "custody" is without merit.

b. Motions for Summary Judgment in Habeas Corpus Cases

Petitioner moved for summary judgment. (Doc. No. 19). Summary judgment is available "if the pleadings, the discovery, the disclosure documents on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To the extent motions for summary judgment are appropriate at all in federal habeas proceedings, they are authorized under Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts, which extends "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules . . .."

However, federal habeas cases generally consist of "an answer and reply [to the petition] (Rule 5), an evidentiary hearing in some cases (Rule 8), and the entry of an order with or without a certificate of appealability (Rule 11)[.]" *Gussner v. Gonzalez*, No.: 12-CV-01876-LHK, 2013 U.S. Dist. LEXIS 15648, at *3 (N.D. Cal. Feb. 5, 2013) (citing R. Governing Section 2254 Cases). The

habeas rules "do not contemplate either a trial or an additional set of briefing or hearing." *Id.* (explaining that the passage of AEDPA "worked a significant change in federal habeas corpus review of state court criminal convictions and severely limited the scope of review").

Here, the court set a briefing schedule ordering respondent to file a response to the petition consisting of either an answer or a motion to dismiss. (Doc. No. 4 at 1-2). The order then permitted petitioner to file a traverse to respondent's answer or an opposition to respondent's motion to dismiss. (*Id.*). Petitioner, however, moved for summary judgment. In response, respondent separately filed an opposition to the motion for summary judgment and an answer to the petition. (Doc. Nos. 21, 22).

Since respondent filed an answer addressing the merits of the petition, the procedural posture of this case renders petitioner's motion for summary judgment redundant and unnecessary. *See Dixon v. Thomas*, No. 94-16145, 1994 U.S. App. LEXIS 37269, at *2, n. 1 (9th Cir. 1994) (explaining that where the petitioner moved for summary judgment and the respondent filed an answer "the district court may dispose of the petition after the answer is filed when an evidentiary hearing is not required" and that a denial of a habeas petition on the merits "constitutes an implicit denial of [the petitioner's] summary judgment motion "); *see also Rizzolo v. Puentes*, No. 1:19-cv-00290-SKO (HC), 2019 U.S. Dist. LEXIS 42957, at *3 (E.D. Cal. Mar. 15, 2019) (quoting *Johnson v. Siebel*, No. EDCV 15-277 CBM (AFM), 2015 U.S. Dist. LEXIS 174177, at *1 n.2 (C.D. Cal. Aug. 4, 2015) ("Because the Court's analysis of the merits of a habeas petition is equivalent to a summary judgment motion, '[m]otions for summary judgment are inappropriate in federal habeas cases.'"); *Crim v. Benov*, No. 1:10-cv-01600-OWW-JLT HC2011, U.S. Dist. LEXIS 45873, at *8-9 (E.D. Cal. Apr. 28, 2011) (In habeas proceedings, "motions for summary judgment are unnecessary because petitions may be decided immediately by the Court following submission of the pleadings provided no material issues of fact exist.").

As set forth *infra*, the court addresses the petition on the merits as fully briefed by the parties and recommends denial on the merits. Accordingly, petitioner's motion for summary judgment should be denied.

c. Constitutional Claims related to Civil Protection Order

A federal court "shall entertain an application for a 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). The "judgment" in § 2254(a) refers to "the state judgment pursuant to which the petitioner is being held." *Smith v. Williams*, 871 F.3d 684, 687 (9th Cir. 2017).

Towers does not attack his conviction for possession of a firearm and ammunition, the judgment which resulted in his probation for which he is in "constructive custody." Instead, Towers characterizes the instant habeas petition as a "collateral attack on the restraining order." (Doc. No. 1 at 13). More particularly, Towers attacks the validity of the underlying civil protection order proceedings on the grounds that the events before and during the civil proceedings violated his First Amendment right to free speech and his Fourteenth Amendment right to due process. (*Id.* at 4). Towers claims the civil restraining order violated his free speech rights because he did not make any "true threats" during the county planning meetings, and county officials retaliated against him after he filed numerous lawsuits against the county and its employees. (*Id.* at 13). Alternatively, Towers claims the trial court violated his due process rights during the restraining order hearing when it denied him a change of venue, a continuance, and the right to present witnesses in his defense. (*Id.* at 9-10, 13). All these claims attack the underlying civil proceedings surrounding the issuance of the restraining order, rather than the judgment for which petitioner is on probation. Because Towers is not "in custody," constructive or otherwise, as a result of the civil restraining order, he cannot challenge the validity of the restraining order in this habeas proceeding.

To the extent Towers claims government actors violated his constitutional rights to free speech and due process during his civil restraining order proceedings, such claims fall within the purview of a civil rights action under 42 U.S.C. § 1983. Section 1983 is the proper vehicle for a litigant who claims "that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). A person deprives another of a constitutional right, "within the meaning of § 1983, 'if he does an affirmative act, participates in another's affirmative act, or omits to perform

an act which he is legally required to do that causes the deprivation of which complaint is made.'" *Preschooler II v. Clark Cty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). Accordingly, Towers claims that county employees and the trial court, acting under color of state law, violated his free speech and due process rights before and during the civil restraining order proceedings are actionable under § 1983 but not under the federal habeas statute.[3]

d. *Nolo Contendere* Plea

To warrant federal habeas relief, a petitioner must demonstrate that his custody violates federal law. *See* 28 U.S.C. §§ 2241(a), (c)(3), 2254(a); *Williams v. Taylor*, 529 U.S. 362, 374-75 (2000). When a petitioner enters a guilty plea, review of a habeas claim is limited to challenging the voluntary and intelligent character of the plea or his counsel's ineffectiveness in advising the petitioner to enter a plea.[4] *See Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *Ortberg v. Moody*, 961 F.2d 135, 137 (9th Cir. 1992) ("As a result, Petitioner's *nolo contendere* plea precludes him from challenging alleged constitutional violations that occurred prior to the entry of that plea.").

Thus, to the extent Towers challenges his conviction for possession of a firearm and ammunition in violation of his civil protection order, he has failed to state a cognizable habeas claim. (Doc. No. 1 at 1, 13). Because Towers pleaded *nolo contendere* to the charge, the court's review is limited to either the voluntary and intelligent character of Tower's plea or of his counsel's ineffectiveness in advising Towers to enter the plea. The petition contains no such claims. Rather, the grounds upon which Towers seeks relief center on alleged violations of his right to free speech and due process before and during his civil protection order hearing. (*Id.* at 14-15). Accordingly, Towers' claims related to his firearms and ammunition conviction should be denied as without merit.[5]

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[3] The court notes that a civil rights action will likely be deemed precluded and subject to summary dismissal. Petitioner unsuccessfully sought civil rights relief from this court twice, claiming, *inter alia*, violation of his First Amendment rights. *See Towers v. Cty. of San Joaquin*, No. 2:17-CV-02597-JAM-KJN (E.D. Cal. Aug. 29, 2018) (granting defendant's motion to dismiss); *Towers v. Myles*, No. 2:18-CV-02996-JAM-KJN (E.D. Cal. Aug. 2, 2019) (granting defendant's motion to dismiss).

[4] In California, a plea of *nolo contendere* "shall be considered the same as a plea of guilty and that, upon a plea of *nolo contendere*, the court shall find the defendant guilty." Cal. Pen. Code § 1016.3.

[5] In his reply, petitioner states certain pages were missing from the records submitted by respondent. (Doc.

IV. CERTIFICATE OF APPEALABILITY

A petitioner seeking a writ of habeas corpus has no absolute right to appeal a district court's denial of a petition; he may appeal only in limited circumstances. *See* 28 U.S.C. § 2253; *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Rule 11 Governing § 2254 Cases requires a district court to issue or deny a certificate of appealability when entering a final order adverse to a petitioner. *See also* Ninth Circuit Rule 22-1(a); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). A certificate of appealability will not issue unless a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires the petitioner to show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *accord Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, petitioner has not made a substantial showing of the denial of a constitutional right. Thus, the court declines to issue a certificate of appealability.

Accordingly, it is **RECOMMENDED**:

1. Petitioner's motion for summary judgment (Doc. No. 19) be **DENIED**.
2. The petition (Doc. No. 1) be **DENIED with prejudice on the merits**.
3. Petitioner be denied a certificate of appealability.

NOTICE TO PARTIES

These findings and recommendations will be submitted to the United States district judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30) days after being served with these findings and recommendations, a party may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Parties are advised that failure to file objections within the

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No. 24 at 6-7). Because petitioner submitted the pages he claims were missing, (*id.* at 27-77), the court does not address the issue of the missing pages.

specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: April 1, 2021

Helena M. Barch-Kuchta

HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE