

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 23 2018

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

TANH HUU LAM,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 17-16641

D.C. No.

2:17-cv-01295-GEB-KJN

Eastern District of California,
Sacramento

ORDER

Before: REINHARDT, PAEZ, and BEA, Circuit Judges.

Upon a review of the record and the response to the court's October 30, 2017 order, we conclude the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard).

Accordingly, we summarily affirm the district court's judgment.

All pending motions are denied as moot.

AFFIRMED.

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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 TANH HUN LAM,

12 Plaintiff,

13 v.

14 UNITED STATES,

15 Defendant.
16

No. 2:17-cv-1295 GEB KJN P

ORDER

17 Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief
18 under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to
19 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

20 On July 5, 2017, the magistrate judge filed findings and recommendations herein which
21 were served on plaintiff and which contained notice to plaintiff that any objections to the findings
22 and recommendations were to be filed within fourteen days. Plaintiff has filed objections to the
23 findings and recommendations.

24 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this
25 court has conducted a de novo review of this case. Having carefully reviewed the entire file, the
26 court finds the findings and recommendations to be supported by the record and by proper
27 analysis.

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1 Accordingly, IT IS HEREBY ORDERED that:

- 2 1. The findings and recommendations filed July 5, 2017, are adopted in full; and
3 2. The complaint is dismissed.

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5 Dated: August 4, 2017

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9 GARLAND E. BURRELL, JR.
10 Senior United States District Judge
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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 TANH HUN LAM,

12 Plaintiff,

13 v.

14 UNITED STATES,

15 Defendants.
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No. 2:17-cv-1295 KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

17 Plaintiff is a federal prisoner. On June 23, 2017, plaintiff filed a document styled, "Civil
18 Right[s] Complaint for Equitable Relief Under Article III, Section 2 of the Constitution of the
19 United States." (ECF No. 1.) Plaintiff asks the court to grant him permission to re-file a motion
20 under 28 U.S.C. § 2255 in his underlying criminal proceeding. (ECF No. 1 at 11.)

21 First, plaintiff may not seek permission to file a second § 2255 through a complaint for
22 equitable relief. Rather, plaintiff must seek permission from the Court of Appeals for the Ninth
23 Circuit. "A second or successive motion must be certified as provided in section 2244 by a panel
24 of the appropriate court of appeals." 28 U.S.C. § 2255; see also 28 U.S.C. § 2244(b)(3).

25 Second, the court's own records reveal that on January 30, 2017, plaintiff filed a motion
26 styled "Motion for Relief from the Judgment under Article III Section 2 of the Constitution," in
27 plaintiff's underlying criminal case, United States v. Lam, No. 2:97-cr-0054 WBS (E.D. Cal.)
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1 (ECF No. 479).¹ Although plaintiff's motion was 10 pages with 11 pages of attachments, and the
2 instant "complaint" is 12 pages, comparison of these two documents reveals plaintiff's allegations
3 are virtually identical, including relying on the same cases in support of his requested relief.² Due
4 to the duplicative nature of the present action, the court will recommend that the complaint be
5 dismissed.

6 Third, on April 24, 2017, plaintiff filed a request to amend the title of his motion for relief
7 in No. 2:97-cr-0054 WBS to substitute "Civil Rights Complaint for Equitable Relief." Id. (ECF
8 No. 485.) On April 24, 2017, the district court denied plaintiff's motion, stating: "Changing the
9 title of the pleading would neither change its substantive content nor cure its defects." Id. (ECF
10 No. 487 at 1.) Because plaintiff again seeks the same relief he sought in his underlying criminal
11 action, the complaint must be dismissed.

12 In accordance with the above, IT IS HEREBY ORDERED that the Clerk of the Court is
13 directed to assign a district judge to this case; and

14 IT IS HEREBY RECOMMENDED that the complaint be dismissed.

15 These findings and recommendations are submitted to the United States District Judge
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
17 after being served with these findings and recommendations, plaintiff may file written objections
18 with the court and serve a copy on all parties. Such a document should be captioned
19 "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that

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22 ¹ A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d
23 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

24 ² In addressing the January motion for relief, the undersigned found that plaintiff raised his
25 argument regarding Massaro v. United States, 538 U.S. 500 (2003), in his September 15, 2005
26 motion for relief from judgment, which the district court denied on November 30, 2005, because
27 the motion was successive under 28 U.S.C. § 2255. No. 2:97-cr-0054 WBS KJN (ECF No. 484).
28 On April 19, 2017, the undersigned recommended that the January 30, 2017 motion also be
construed as a § 2255 motion and denied as successive. No. 2:97-cr-0054 WBS KJN (ECF No.
484). On May 18, 2017, the district court adopted the findings and recommendations and denied
the motion. No. 2:97-cr-0054 WBS KJN (ECF No. 487).

1 failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: July 5, 2017

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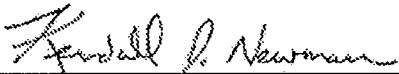
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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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from this filing is
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Clerk's Office.**