User Name: Jennifer Breedon
Date and Time: Oct 22, 2015 11:50 p.m. EDT
Job Number: 25333105

Documents(8)

1. *Ghafur v. California, 2013 U.S. Dist. LEXIS 116583*
   Client/Matter: -None-
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

2. *Ghafur v. Eichenberger, 2011 U.S. Dist. LEXIS 12144*
   Client/Matter: -None-
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

3. *Ghafur v. California, 2015 U.S. Dist. LEXIS 120852*
   Client/Matter: -None-
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

4. *Ghafur v. Davis, 2012 U.S. Dist. LEXIS 132604*
   Client/Matter: -None-
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

5. *Ghafur v. Davis, 2012 U.S. Dist. LEXIS 141886*
   Client/Matter: -None-
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

6. *Ghafur v. Eichenberger, 2009 U.S. Dist. LEXIS 89606*
   Client/Matter: -None-
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

7. *Ghafur v. Perkins, 2014 U.S. Dist. LEXIS 5884*
   Client/Matter: -None-
   Narrowed by:

Content Type	Narrowed by
Cases	-None-

8. *Ghafur v. Perkins, 2014 U.S. Dist. LEXIS 184718*

Client/Matter: -None-

Narrowed by:

Content Type	Narrowed by
Cases	-None-

Positive
As of: October 22, 2015 11:50 PM EDT

Ghafur v. California

United States District Court for the Eastern District of California

August 16, 2013, Decided; August 16, 2013, Filed

Case No.: 1:13-cv-01282-JLT

Reporter
2013 U.S. Dist. LEXIS 116583; 2013 WL 4460277

KHADIJAH GHAFUR, Petitioner, v. THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

Subsequent History: Magistrate's recommendation at, Habeas corpus proceeding at *Ghafur v. Perkins, 2014 U.S. Dist. LEXIS 5884 (E.D. Cal., Jan. 16, 2014)*
Petition denied by *Ghafur v. California, 2015 U.S. Dist. LEXIS 120852 (E.D. Cal., Sept. 10, 2015)*

Prior History: *Ghafur v. Davis, 2012 U.S. Dist. LEXIS 141886 (E.D. Cal., Oct. 1, 2012)*

Core Terms

custody, tolling, limitations period, parole, one-year, sentence, habeas petition, equitable tolling, habeas corpus, expired, instant petition, filed petition, petitions, prison, cases, statute of limitations, untimely, notice, days, collateral review, properly filed, writ petition, state court, collateral

Counsel: **[*1]** ***Khadijah Ghafur***, Petitioner, Pro se, Fresno, CA.

Judges: Jennifer L. Thurston, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Jennifer L. Thurston

Opinion

ORDER TO SHOW CAUSE WHY THE PETITION SHOULD NOT BE DISMISSED FOR VIOLATION OF THE ONE-YEAR STATUTE OF LIMITATIONS AND/OR NOT BEING ″IN CUSTODY″

ORDER REQUIRING PETITIONER TO FILE MOTION TO NAME PROPER RESPONDENT

ORDER DIRECTING THAT RESPONSE BE FILED WITHIN THIRTY DAYS

Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas corpus pursuant to *28 U.S.C. § 2254*.

PROCEDURAL HISTORY

The instant petition was filed on July 18, 2013. [1] A preliminary review of the petition, however, reveals that the Court may lack jurisdiction over this matter and that the petition may be untimely.

DISCUSSION

A. The ″In Custody″ Requirement.

[1] In Houston v. Lack, the United States Supreme Court held that a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the actual date of its receipt by the court clerk. Houston v. Lack, 487 U.S. 266, 267, 108 S. Ct. 2379, 2385, 101 L. Ed. 2d 245 (1988). The rule is premised on the pro se prisoner's mailing of legal documents through the conduit of ″prison authorities whom he cannot control and whose **[*2]** interests might be adverse to his.″ Miller v. Sumner, 921 F.2d 202, 203 (9th Cir. 1990); see Houston, 487 U.S. at 271. The Ninth Circuit has applied the ″mailbox rule″ to state and federal petitions in order to calculate the tolling provisions of the AEDPA. ***Saffold v. Neland, 250 F.3d 1262, 1268-1269 (9th Cir. 2000)***; Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003). The date the petition is signed may be considered the earliest possible date an inmate could submit his petition to prison authorities for filing under the mailbox rule. Jenkins v. Johnson, 330 F.3d 1146, 1149 n. 2 (9th Cir. 2003). Accordingly, for all of Petitioner's state petitions and for the instant federal petition, the Court will consider the date of signing of the petition (or the date of signing of the proof of service if no signature appears on the petition) as the earliest possible filing date and the operative date of filing under the mailbox rule for calculating the running of the statute of limitation. Petitioner signed the instant petition on July 18, 2013. (Doc. 1, Ex. 1, pp. 21; 23).

Pursuant to 28 U.S.C. § 2254(a), ″[t]he Supreme Court, a Justice thereof, **[*3]** a circuit judge, or 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* only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.″ (Emphasis supplied). This ″in custody″ requirement has been interpreted to mean that federal courts lack jurisdiction over habeas corpus petitions unless the petitioner is ″under the conviction or sentence under attack at the time his petition is filed.″ Maleng v. Cook, 490 U.S. 488, 490-491, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989)(per curiam); Resendiz v. Kovensky, 416 F.3d 952, 955 (9th Cir. 2005).

It is well-established that ″once the sentence imposed for a conviction has completely expired, the collateral consequences of the conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it. Maleng, 490 U.S. at 492; Feldman v. Perrill, 902 F.2d 1445 (9th Cir. 1990). Thus, when a petitioner completes his or her sentence before the habeas petition is filed, the issue becomes one of whether the conviction and sentence has merely collateral consequences-themselves **[*4]** insufficient to establish the ″in custody″ requirement-or whether the conviction and sentence impose a ″restraint on liberty.″ Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998). For example, a sentence of fourteen hours of attendance at an alcohol rehabilitation program renders someone ″in custody.″ Dow v. Circuit Court of the First Circuit, 995 F.2d 922, 923 (9th Cir. 1993). Similarly, a convict released on his own recognizance pending execution of his sentence is ″in custody″ because he is obligated to appear at times and places ordered by the court. Hensley v. Municipal Court, 411 U.S. 345, 351, 93 S.Ct. 1571, 36 L. Ed. 2d 294 (1973). Also, a parolee is ″in custody″ because, ″[w]hile petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom.″ Jones, 371 U.S. at 243. See Barry v. Bergen County Probation Department, 128 F.3d 152, 161 (3d Cir. 1997)(sentence of 500 hours community service placed petitioner ″in custody″). However, fines or restitution are simply ″collateral consequences″ and are insufficient to render someone ″in custody.″ Williamson, 151 F.3d at 1183.

The ″in custody″ requirement is jurisdictional **[*5]** for a federal habeas court. Bailey v. Hill, 599 F.3d 976, 978 (9th Cir. 2010). In Bailey, the Ninth Circuit observed that the ″in custody″ requirement of federal habeas law has two aspects. First, the petitioner must be ″under the conviction or sentence under attack at the time his petition is filed.″ Bailey, 599 F.3d at 978-979, *quoting* Resendiz v. Kovensky, 416 F.3d 952, 956 (9th Cir. 2005). For this aspect of ″in custody,″ actual physical custody is not indispensable to confer jurisdiction; rather, the court will have habeas jurisdiction if a sufficient ″restraint on liberty,″ as opposed to a mere ″collateral consequence of a conviction,″ exists. Id. at 979. In this case, Petitioner has acknowledged in her petition that she was not in actual physical custody of Respondent at the time she filed the instant petition. If Petitioner was on parole at that time, the ″in custody″ requirement would be satisfied. However, if Petitioner had completed both her sentence and any term of parole prior to filing the instant petition, this Court lacks jurisdiction to consider her petition. In her response to this Order to Show Cause, Petitioner SHALL provide information regarding her precise custodial **[*6]** status at the time of filing of the petition.

B. Preliminary Review of Petition.

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it ″plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . . .″ Rule 4 of the Rules Governing Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir.2001).

The Ninth Circuit, in Herbst v. Cook, concluded that a district court may dismiss *sua sponte* a habeas petition on statute of limitations grounds so long as the court provides the petitioner adequate notice of its intent to dismiss and an opportunity to respond. 260 F.3d at 1041-42. By issuing this Order to Show Cause, the Court is affording Petitioner the notice required by the Ninth Circuit in Herbst.

C. Limitation Period For Filing Petition For Writ Of Habeas Corpus

On April 24, 1996, Congress enacted the Antiterrorism **[*7]** and Effective Death Penalty Act of 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 2063, 138 L. Ed. 2d 481 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1008, 118 S. Ct. 586, 139 L. Ed. 2d 423 (1997). The instant petition was filed on July 18, 2013, and thus, it is subject to the provisions of the AEDPA.

The AEDPA imposes a one year period of limitation on petitioners seeking to file a federal petition for writ of

habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d) reads:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) **[*8]** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

In most cases, the limitation period begins running on the date that the petitioner's direct review became final. Here, the Petitioner was convicted on June 30, 2006 of six counts of grand theft, five counts of misappropriating public money, and two counts of tax evasion. (Doc. 1, Ex. 18, pp. 4-5). Petitioner was sentenced to a determinate term of 14 years. (Doc. 1, p. 2). In her direct appeal of those convictions, Petitioner filed a petition for review that was denied by the California Supreme Court on July 30, 2008, in case no. S163821, 2008 Cal. LEXIS 9449. [2] Thus, direct review would **[*9]** have concluded on November 4, 2008, when the ninety day period for seeking review in the United States Supreme Court expired. Barefoot v. Estelle, 463 U.S. 880, 887, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983); Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir.1999); Smith v. Bowersox, 159 F.3d 345, 347 (8th Cir.1998). Petitioner would then have had 365 days from the following day, November 5, 2008, or until November 4, 2009, absent applicable tolling, within which to file her federal petition for writ of habeas corpus. As mentioned, the instant petition was not filed until July 18, 2013, almost four years after the one-year period expired. Therefore, unless Petitioner is entitled to either statutory tolling or equitable tolling, the petition is untimely and should be dismissed.

D. Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

Under the AEDPA, the statute of limitations is tolled during the time that a properly filed application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531 U.S. 4, 8, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000). An application is pending **[*11]** during the time that 'a California petitioner completes a full round of [state] collateral review," so long as there is no unreasonable delay in the intervals between a lower court decision and the filing of a petition in a higher court. Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), abrogated on other grounds as recognized by Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008)(per curium)(internal quotation marks and citations omitted); see Evans v. Chavis, 546 U.S. 189, 193-194, 126 S. Ct. 846, 163 L. Ed. 2d 684 (2006); see Carey v. Saffold, 536 U.S. 214, 220, 222-226, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002); see also, Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).

Nevertheless, there are circumstances and periods of time when no statutory tolling is allowed. For example, no

[2] The court may take notice of facts that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993). The record of state court proceeding is a source whose accuracy cannot reasonably be questioned, and judicial notice may be taken of court records. Mullis v. United States Bank. Ct., 828 F.2d 1385, 1388 n.9 (9th Cir. 1987); **[*10]** Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), *aff'd*, 645 F.2d 699 (9th Cir.); see also Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989); Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th. Cir. 1980). As such, the internet website for the California Courts, containing the court system's records for filings in the Court of Appeal and the California Supreme Court are subject to judicial notice. This Court has accessed that internet website to ascertain the precise dates that Petitioner filed her direct appeal and any state habeas petitions filed in either the California Court of Appeal or the California Supreme Court.

statutory tolling is allowed for the period of time between finality of an appeal and the filing of an application for post-conviction or other collateral review in state court, because no state court application is ″pending″ during that time. Nino, 183 F.3d at 1006-1007; Rasberry v. Garcia, 448 F.3d 1150, 1153 n. 1 (9th Cir. 2006). Similarly, no statutory tolling is allowed for the period between finality of an appeal and the filing of a federal petition. Id. at 1007. **[*12]** In addition, the limitation period is not tolled during the time that a federal habeas petition is pending. Duncan v. Walker, 533 U.S. 167, 181-182, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001); see also, Fail v. Hubbard, 315 F. 3d 1059, 1060 (9th Cir. 2001)(as amended on December 16, 2002). Further, a petitioner is not entitled to statutory tolling where the limitation period has already run prior to filing a state habeas petition. Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) (″section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed.″); Jiminez v. White, 276 F. 3d 478, 482 (9th Cir. 2001). Finally, a petitioner is not entitled to continuous tolling when the petitioner's later petition raises unrelated claims. See Gaston v. Palmer, 447 F.3d 1165, 1166 (9th Cir. 2006).

Apart from her direct appeal, Petitioner has provided little information about her state habeas proceedings, despite the fact that the form petition expressly provides space for such required information. However, the Court, by accessing the California court system's electronic database, has determined that Petitioner has filed the following state habeas petitions: **[*13]** (1) petition filed in the California Court of Appeal, Fifth Appellate District (″5th DCA″) in case no. F054746 on February 21, 2008 and denied on March 13, 2008; (2) petition filed in the California Supreme Court in case no. S162686, 2008 Cal. LEXIS 13415 on April 14, 2008 and denied on November 12, 2008; (3) petition filed in the Fresno County Superior Court on unspecified date and denied on June 13, 2011; (4) petition filed in the 5th DCA in case no. F063022 on August 10, 2011 and denied on September 9, 2011; (5) petition filed in the Fresno Superior Court in case no. 12CRWR681055 on August 31, 2012 and denied on November 6, 2012; (6) petition filed in the California Supreme Court in case no. S200525, 2012 Cal. LEXIS 5967 on March 1, 2012 and denied on June 20, 2012; and (7) petition filed in the California Supreme Court in case no. S209778, 2013 Cal. LEXIS 5547 on April 4, 2013 and denied on June 26, 2013.

The Court will assume, for the sake of argument, that all of these petitions challenged the same 2006 conviction in the Fresno County Superior Court and that all were ″properly filed″ within the meaning of the AEDPA for purposes of statutory tolling. The first petition has no bearing upon the running of the one-year period since it was filed and **[*14]** denied *before* the commencement of the one-year period. A tolling provision has no applicability where the period to be tolled has not commenced. See Hill v. Keane, 984 F.Supp. 157, 159 (E.D.N.Y. 1997), *abrogated on other grounds*, Bennett v. Artuz, 199 F.3d 116, 122 (2d Cir. 1999) (state collateral action filed before commencement of limitations period does not toll limitation period), *affirmed*, 531 U.S. 4, 121 S.Ct. 361, 148 L.Ed.2d 213. Here, the first state petition was filed on February 21, 2008 and denied on March 13, 2008, approximately eight months before the one-year period commenced. Thus, the first state petition had no tolling implications for Petitioner.

The second petition was filed on April 14, 2008 and remained pending until November 12, 2008. As mentioned previously, the one-year period would have started on November 5, 2008; however, the pendency of the second state petition would have delayed the start of the one-year period until the second petition was denied on November 12, 2008, thus resulting in a delay in the start of the limitation period of seven days. Accordingly, the one-year period commenced on November 13, 2008 and would have ended, absent tolling, on November **[*15]** 12, 2009.

Petitioner has not provided information concerning any state habeas petitions she has filed; however, the documents appended to her petition indicate that she filed her third petition in the Fresno County Superior Court which was denied on June 13, 2011. Unfortunately, no filing date is evident in the record. Accordingly, the Court is unable to determine when any statutory tolling would have commenced for this third petition. Obviously, if that third petition were filed after November 12, 2009, the date the one-year period would have expired, then the petition would be untimely since any petitions filed after the expiration of the statute of limitations are irrelevant to the computation of statutory tolling. A petitioner is not entitled to tolling where the limitations period has already run prior to filing a state habeas petition. Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000); Jiminez v. Rice, 276 F.3d 478 (9th Cir. 2001); see Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir. 2000)(same); Ferguson v. Palmateer, 321 F.3d 820 (9th Cir. 2003)(″section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed.″); **[*16]** Jackson v. Dormire, 180 F.3d 919, 920 (8th Cir. 1999) (petitioner fails to exhaust claims raised in state habeas corpus filed after expiration of the one-year limitations period). Given that the third petition was dismissed by the Superior Court on June 13, 2011, Petitioner would have to establish either that this third petition was

filed prior to November 12, 2009, i.e., that it was pending in the Superior Court for over one and one-half years, or that she filed other state habeas petitions during this same period that would have entitled her to additional statutory tolling. Otherwise, the lengthy period between the denial of the second petition and the filing of the third petition would be fatal to Petitioner's case.

As mentioned, the four remaining state petitions were filed after the one-year period appeared to have expired; accordingly, they have no bearing on the timeliness of the instant petition. *Green v. White, 223 F.3d at 1003*. Thus, unless Petitioner is entitled to equitable tolling, it appears that the petition is untimely and should be dismissed.

E. Equitable Tolling.

The running of the one-year limitation period under *28 U.S.C. § 2244(d)* is subject to equitable tolling in **[*17]** appropriate cases. See *Holland v. Florida, 560 U.S. 631, 130 S.Ct. 2549, 2561, 177 L. Ed. 2d 130 (2010)*; *Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997)*. The limitation period is subject to equitable tolling when "extraordinary circumstances beyond a prisoner's control make it impossible to file the petition on time." *Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)*(internal quotation marks and citations omitted). "When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate." *Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999)*. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Holland, 130 S.Ct. at 2552*; *Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)*. "[T]he threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions swallow the rule." *Miranda v. Castro, 292 F. 3d 1063, 1066 (9th Cir. 2002)*(citation omitted). As a consequence, "equitable **[*18]** tolling is unavailable in most cases." *Miles, 187 F. 3d at 1107*.

Here, Petitioner has made no express claim of entitlement to equitable tolling and, based on the record now before the Court, the Court sees no basis for such a claim. An untimely petition must be dismissed. However, before dismissing the petition, the Court will afford Petitioner the opportunity to provide additional information regarding any other state habeas petitions she filed during the periods discussed above. Particularly, Petitioner should focus on the time period from the denial of her second petition on November 12, 2008 until the filing of her third petition in the Fresno County Superior Court. If more than 365 days intervened between those two events, without the benefit of further statutory tolling for properly filed state petitions, the petition will be deemed untimely under federal law and dismissed.

F. Failure To Name The Proper Respondent.

A petitioner seeking habeas corpus relief under *28 U.S.C. § 2254* must name the state officer having custody of him as the respondent to the petition. *Rule 2 (a) of the Rules Governing § 2254 Cases*; *Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996)*; *Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994)*. **[*19]** Normally, the person having custody of an incarcerated petitioner is the warden of the prison in which the petitioner is incarcerated because the warden has "day-to-day control over" the petitioner. *Brittingham v. United States, 982 F.2d 378, 379 (9th Cir. 1992)*; see also, *Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994)*. However, the chief officer in charge of state penal institutions is also appropriate. *Ortiz, 81 F.3d at 894*; *Stanley, 21 F.3d at 360*. Where a petitioner is on probation or parole, the proper respondent is his probation or parole officer and the official in charge of the parole or probation agency or state correctional agency. Id.

Here, Petitioner has named as Respondent, the People of the State of California. However, the People of the State of California is not the warden or chief officer of the institution where Petitioner is confined and, thus, does not have day-to-day control over Petitioner, nor is the named respondent the parole officer or official in charge of parole for Petitioner. Petitioner has alleged that she has completed her prison term and has been "released from confinement." (Doc. 1, p. 2). Under normal circumstances, Petitioner **[*20]** would be required to serve a period of parole following her sentence. If that is the case and Petitioner is presently on parole, Petitioner should name as Respondent either the Director of the California Department of Corrections and Rehabilitations ("CDCR"), her parole officer, the director of her parole agency, or, if she is no longer on parole, either the director of CDCR or the Attorney General of California.

Petitioner's failure to name a proper respondent requires dismissal of his habeas petition for lack of jurisdiction. *Stanley, 21 F.3d at 360*; *Olson v. California Adult Auth., 423 F.2d 1326, 1326 (9th Cir. 1970)*; see also, *Billiteri v. United States Bd. Of Parole, 541 F.2d 938, 948 (2nd Cir. 1976)*. **However, the Court will give Petitioner the opportunity to cure this defect by amending the petition to name a**

proper respondent, such as her parole officer, the director of CDCR, or the Attorney General of California. See *West v. Louisiana, 478 F.2d 1026, 1029 (5th Cir.1973), vacated in part on other grounds*, *510 F.2d 363 (5th Cir.1975)* (en banc) (allowing petitioner to amend petition to name proper respondent); *Ashley v. State of Washington, 394 F.2d 125 (9th Cir. 1968)* (same). **[*21]** In any amended petition, Petitioner must name a proper respondent.

In the interests of judicial economy, Petitioner *need not* file an amended petition. Instead, Petitioner can satisfy this deficiency in his petition by filing a motion entitled "Motion to Amend the Petition to Name a Proper Respondent" wherein Petitioner may name the proper respondent in this action.

As the foregoing discussion suggests, the Court does not have sufficient information to make a final determination regarding the timeliness of the petition and Petitioner's custodial status at the time of filing. Accordingly, in her response to the Order to Show Cause, Petitioner is required to provide the additional information indicated in this Order to Show Cause in order to permit this Court to determine whether the petition is timely and whether the Court has jurisdiction to proceed.

ORDER

For the foregoing reasons, the Court HEREBY ORDERS:

1. Petitioner is ORDERED TO SHOW CAUSE within thirty (30) days of the date of service of this Order why the Petition should not be dismissed for violation of the one-year statute of limitations in *28 U.S.C. § 2244(d)* and for failure to satisfy the "in custody" requirement for habeas jurisdiction;

2. **[*22]** Petitioner is ORDERED to file a motion to amend the petition to name a proper respondent within thirty days of the date of service of this order.

Petitioner is forewarned that his failure to comply with this order may result in a Recommendation that the Petition be dismissed pursuant to *Local Rule 110*.

IT IS SO ORDERED.

Dated: **August 16, 2013**

/s/ Jennifer L. Thurston

UNITED STATES MAGISTRATE JUDGE

Positive
As of: October 22, 2015 11:50 PM EDT

Ghafur v. Eichenberger

United States District Court for the Eastern District of California

February 8, 2011, Decided; February 8, 2011, Filed

1:08-CV-01502-OWW JMD HC

Reporter
2011 U.S. Dist. LEXIS 12144; 2011 WL 442440

KHADIJAH GHAFUR, Petitioner, v. K. EICHENBERGER, Respondent.

Subsequent History: Habeas corpus proceeding at *Ghafur v. Davis, 2012 U.S. Dist. LEXIS 132604 (E.D. Cal., Sept. 17, 2012)*

Prior History: *Ghafur v. Eichenberger, 2009 U.S. Dist. LEXIS 89606 (E.D. Cal., Sept. 9, 2009)*

Core Terms

enrollment, funding, student enrollment, juror, projected, attendance, court of appeals, charter school, state court, Finance, budget, figures, common scheme, documents, sites, trial court, records, recommended, facsimile, counts, clearly established federal law, public funds, confirmed, prima facie case, habeas corpus, investors, numbers, bonds, contacted, broker

Counsel: **[*1]** ***Khadijah Ghafur***, Petitioner, Pro se, CHOWCHILLA, CA.

For K Eichenberger, Respondent: Kathleen Anne McKenna, LEAD ATTORNEY, California Dept. Justice, Office of the Attorney General, Fresno, CA.

Judges: John M. Dixon, UNITED STATES MAGISTRATE JUDGE.

Opinion by: John M. Dixon

Opinion

FINDING AND RECOMMENDATION REGARDING PETITION FOR WRIT OF HABEAS CORPUS

OBJECTIONS DUE WITHIN THIRTY (30) DAYS

Petitioner ***Khadijah Ghafur*** ("Petitioner") is a state prisoner proceeding with a petition for writ of habeas corpus pursuant to *28 U.S.C. § 2254*.

Procedural History

On June 30, 2006, a jury convicted Petitioner of misappropriating public funds (Cal. Pen. Code, § 424; counts 1, 3, 5, 7, 9) [1] , grand theft (§ 487; counts 2, 4, 6, 8, 10, 11), failing to file a state income tax return (Cal. Rev. & Tax. Code, § 19706; count 12), and willfully filing a false return (Cal. Rev. & Tax. Code, § 19705, subd. (a)(1); count 13). See Clerk's Transcript at 1643-44. Additionally, with respect to counts 1 through 11, the jury found the related felony conduct involved the taking of more than $500,000 and $100,000 (§ 186.11, subds. (a)(2) & (a)(3); special allegation Nos. 1 & 2, respectively); that the intentional taking, pursuant to a common scheme or **[*2]** plan, exceeded $50,000 and $150,000 (§ 12022.6, subds. (a)(1) & (a)(2); special allegations Nos. 3 & 4, respectively); and that the amount of the theft exceeded $100,000 (§ 1203.045; special allegation No. 5). See Respondent ("Resp't") Lodged 1, Fifth District Court of Appeal's April 21, 2008 Opinion at 1.

The trial court imposed a total unstayed term of 14 years in prison and ordered Petitioner to pay victim restitution in the amount of $630,000. See Resp't Lodged 1.

On April 21, 2008, in its opinion following Petitioner's direct appeal, the California Court of Appeal affirmed the judgment. See Resp't Lodged 1.

Petitioner filed a petition for review in the California Supreme Court on May 27, 2008. See Resp't Lodged 2. The California Supreme Court denied the petition on July 30, 2008. See Resp't Lodged 2. In addition to Petitioner's direct appeal, Petitioner sought state habeas review, however the claims raised in the state habeas petitions are unrelated to

[1] Unless otherwise indicated, all statutory references are to the California Penal Code.

the claims raised in the instant petition. See Resp't Answer (Doc. 20) at 3; See Petition at 3.

Petitioner filed her petition for writ of habeas **[*3]** corpus in the United States District Court, Eastern District of California on October 6, 2008. See Petition (Doc. 1). The parties do not dispute that Petitioner's state court remedies were exhausted on direct review. Respondent filed an answer on January 13, 2009. See Resp't Answer (Doc. 20). Petitioner filed a traverse on February 17, 2009. See Traverse (Doc. 23).

Factual Background[2]

The Court adopts the California Court of Appeal's summation of the facts surrounding Petitioner's crime and conviction:

> **PROSECUTION EVIDENCE**
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> Overview and General Information
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> During the mid-1990's, ***Khadijah Ghafur*** spearheaded the creation of a nonprofit organization called Heritage Development Corporation (HDC), which was developed as a social service **[*4]** organization for the education of Muslim women and children . . . .
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> In 1996 or 1997, HDC purchased approximately 440 acres in the foothills of Tulare County, near Miramonte, for around $750,000 . . . .
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> The Miramonte property, which was called Baladullah, came to be home to 30 to 50 families. Concerns about the educational needs of the school-aged children living there led to the development of an independent-study program conducted through Sierra Summit charter school and, ultimately, to creation of Gateway Academy Charter School (Gateway). Gateway's charter petition was approved by the governing board of the Fresno Unified School District (FUSD) in October 1998.
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> Following representations by Gateway to FUSD that the school was not ready to open because facilities were not ready, Gateway first began to have students during the 2000-2001 school year. It started with 200 students at two sites in Fresno. [Naazim] Hamed had students of his own prior to becoming affiliated with Gateway, and he brought a number of them with him to Gateway. Ultimately, he became Gateway's chief administrative officer. Ghafur, Gateway's superintendent and president of its board of trustees, was his boss.
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> Hamed **[*5]** recruited other educators to participate in Gateway. One such person was Alfonso Uribe, who became involved with Gateway in spring of 2000, when Hamed asked him to serve as a consultant. Ghafur subsequently offered Uribe the position of chief academic officer/principal, effective at such time as there were enough students to warrant, and a sufficient guarantee of average daily attendance (ADA) funds to support, that position. [FN3] Uribe became Gateway's principal in March or April 2001. . . .
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> > FN3. Uribe termed the number of students the "life's blood" of a charter school, because the California Department of Education pays ADA money based on the number of students and their attendance. A school receives so much money per student per year to operate the school, but it is not all received up-front. The amount is predicated on the number of days a student is in attendance. If a school were not part of Gateway, Gateway would not be able to collect ADA funding for that school's students. According to Uribe, although it would not be improper for a school to have a list of potential students in order to plan for future operation, it would be improper to have those students included in the **[*6]** enrolled students for whom the school received money.
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> . . . .
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> California uses County Offices of Education to distribute monies to school districts and charter schools. Charter schools can choose either to be direct funded, meaning they receive the monies from the County Office of Education, or to receive their funds through their sponsoring school district. The first year, Gateway chose to have money come through the school district. The second year, Gateway chose to be direct funded. Between November 30, 2000 and September 6, 2001, FUSD paid Gateway a total of more than $1.6 million in public funds, which consisted of a combination of monies received from the State of California and Gateway's share of local property taxes, each of which was based on the ADA that was generated. The first two checks, issued November 30, 2000, and January 2,

[2] These facts are derived from the California Court of Appeal's opinion issued on April 21, 2008. See Lodged Doc. 1. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, a determination of fact by the state court is presumed to be correct unless Petitioner rebuts that presumption with clear and convincing evidence. ***28 U.S.C. § 2254(e)(1)***; see ***Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004)***; ***Moses v. Payne, 555 F.3d 742, 746 n. 1 (9th Cir. 2009)***.

2001, were based on the ADA that was projected to be generated by Gateway. In 2001, the disbursements were based on the ADA that was generated in the prior school year, based on actual attendance. In almost every instance, Ghafur came in and Rick Martin, FUSD's director of district financial services, handed the check to her.

Under FUSD's memorandum **[*7]** of understanding, charter schools were required to present a proposed budget to FUSD. They were also required to present projections twice a year, and actuals at the end of the year. The budgets needed to be reasonably accurate. The original budget that Gateway submitted in June for the 2001-2002 school year was similar to that for the 2000-2001 school year and was somewhat less than $2 million. In September 2001, however, there was a meeting about Gateway obtaining a loan. The budget submitted at that time was more than $7 million. Moreover, Gateway's unaudited actuals showed a deficit of approximately $1 million, increasing to about $1.3 million. Thus, Gateway was starting off in a negative position coming into 2001-2002. FUSD would not sign off on any loan without seeing a good plan to know how Gateway was going to make itself solvent again. At some point, FUSD asked for documentation from Gateway on how it would be able to grow to 1,000 ADA when it had been at 250 ADA the prior year. None of the information provided by Gateway allayed FUSD's concerns over Gateway's negative number.

. . . .

[Due to Gateway's failure in meeting FUSD's compliance requirements, on January 16, FUSD revoked **[*8]** Gateway's charter]

Counts 1 and 2-Payments to Suraiya Razzak

Sometime after February 1995, Ghafur asked Suraiya Razzak, the daughter of a deceased benefactor to philanthropic and charitable organizations, for financial help. Ghafur wanted to obtain a place in Miramonte for battered women and asked for $20,000. After further contact initiated by Ghafur, Razzak agreed to loan her some money. Over time, Razzak loaned Ghafur $132,000.

It was Razzak's understanding that the various monies transferred to Ghafur constituted interest-free loans. Ghafur said repayment would be made from the rent paid by those living on the Miramonte property, and also from the school she wanted to charter there. At first, there was no set time frame for repayment. Eventually, however, Razzak asked Ghafur to begin repaying her. Razzak asked more than once; each time, Ghafur said it would be soon. Eventually, they reached an agreement whereby $5,000 would be repaid each month.

On September 1, 2000, Razzak began receiving periodic cashier's checks from Ghafur that were drawn on Gateway's account. On January 3, 2001, Razzak created a letter for Gateway's board of directors at the request of Ghafur, who said she wanted **[*9]** to show the letter to the board members in order for the board to repay Razzak's loans, and that Razzak needed to write the letter in order to be repaid. The letter stated, in part, that the loan was interest-free, and had been made to Ghafur for the purpose of research and development, and to cover operational costs until Gateway's opening. Ghafur told Razzak the gist of what to write in this part. Although Razzak received no response to the letter, she did start getting her loan payments. As of trial, Ghafur still owed Razzak close to $55,000.

Edward Hudson, an investigative auditor for the Department of Justice and a certified fraud examiner, performed a reconstruction analysis of bank accounts maintained for Gateway and for Khadijah and Associates. His analysis showed that the monies paid to Razzak came from public funds. [FN4]

> FN4. The trial court took judicial notice of the pertinent statutes and instructed the jury that, under the laws of California, charter schools are part of the state's public school system; charter school officials are officers of public schools to the same extent as members of other boards of education of public school districts; and a superintendent of a **[*10]** charter school system is, like other public school superintendents and board members, a public official.

Counts 3 and 4-Payments to Italo Stanziale

On February 12, 2001, Italo Stanziale sold Ghafur a triplex, located on Dewitt Avenue in Clovis, for $149,000. Ghafur took title in her name and said she was going to live there. Ghafur gave Stanziale a $10,000 deposit, and Stanziale executed a deed of trust with the understanding that she would pay another $10,000 that September. In addition, escrow instructions called for payments of $1,119 per month. Beginning in June 2001, Stanziale received periodic checks that were signed by Ghafur and drawn on Gateway's bank account. In approximately February 2002, Stanziale

instituted foreclosure proceedings on the property because Ghafur had been late on several payments.

Stanziale never performed services or had a consultation agreement with Gateway, nor did he receive a check for $1,119 from Gateway for consultation services. At no time did he spell his last name ″Sotojicle.″ When Abdul-Hafeez requested documentation of expenditures during the Hosaka and Nagel audit, however, Ghafur provided an invoice for consultation services in the amount of **[*11]** $1,114, dated July 7, 2001, from Italo Sotojicle to Gateway, which she said was a fee paid for the company's service in securing a guest house for teachers and staff at an in-service training program.

Hudson's financial analysis showed that the monies paid to Stanziale came from public funds.

Counts 5 and 6-Payment to Heritage Development Corporation

On January 30, 2001, Ghafur purchased a $10,000 cashier's check, drawn on Gateway's account and made payable to HDC. She purchased another $10,000 cashier's check, drawn on Gateway's account and payable to HDC, on April 6, 2001.

An account at Bank of America was established in the name of Heritage Homes to pay the mortgage on Baladullah. On or about January 30, 2001, two cashier's checks in the amount of $10,000 each were drawn on Gateway's account and deposited into the Heritage Homes account. On February 5, 2001, a transfer of $10,000 was made from the Heritage Homes account to Salih Ghafur, Ghafur's ex-husband.

Hudson's review of records showed the monies paid to Heritage Homes came from public funds. The transfer to Salih Ghafur came from the public funds in the Heritage Homes account.

Counts 7 and 8-Payment to Cosmopolitan Finance

On September **[*12]** 22, 1999, Cosmopolitan Finance financed a car for Ghafur. The vehicle was repossessed in early June 2000. Cosmopolitan Finance initiated a small claims action for the balance still owed, and obtained a judgment in the amount of $2,500, plus court costs, on February 9, 2001. Cosmopolitan subsequently sought a writ of execution of wages. On June 15, 2001, it received a personal money order in the amount of $1,000, purchased by Ghafur and drawn on Gateway's account.

During the Hosaka and Nagel audit, Ghafur asked Abdul-Hafeez about a debt she owed to Cosmopolitan Finance. Abdul-Hafeez told Ghafur that she could take an advance from her paycheck. In the financial and payroll history Ghafur submitted for purposes of the audit, the $1,000 payment to Cosmopolitan Finance was shown as being taken as an advance against Ghafur's payroll.

Hudson's review of records showed that the payment made to Cosmopolitan Finance came from public funds.

Counts 9 and 10-Payment to Fresno Business Services

Fresno Business Services was a bookkeeping and payroll service in Fresno that was operated by Nguib ″Nick″ Abdallah. At Ghafur's request, Abdallah became Gateway's bookkeeper for payroll in approximately September **[*13]** 2001.

On November 5, 2001, Ghafur wrote a check to the Tulare County Tax Collector in the amount of $12,401.57. The check was drawn on the account of Khadijah and Associates. On November 6, 2001, at Ghafur's request that day for a loan, Abdallah wrote her a check from Fresno Business Service's line of credit in the amount of $12,500. The money was for the school, which was waiting for funds from the state. Ghafur said Abdallah would be paid within a month. That same day, Ghafur made a deposit in the amount of $13,485 into the account of Khadijah and Associates. On December 20, 2001, a cashier's check was drawn on Ghafur's account, payable to Fresno Business Service in the amount of $12,500. [FN5]

> FN5. According to Abdallah, Ghafur gave him a check from Gateway, which he then exchanged for a cashier's check with which he repaid his line of credit.

Hudson's review of records showed that the payment to Fresno Business Service came from public funds.

Count 11-The Short-Term Bond/Note

Gateway's funding, like that of other charter schools, depended in large part on the ADA. Thus, charter schools were required to submit a report to FUSD for each 20-day attendance period. Judi Sommarstrom worked **[*14]** for Larry Powell, FUSD's associate superintendent, and received student enrollment and attendance reports from all of FUSD's charter schools. If Sommarstrom did not receive one in a timely manner from Gateway, which happened on occasion, she contacted Ghafur or Hamed. She did not know, however, who actually compiled the reports.

Habibah Amatussalam was Gateway's registrar. Hamed was her direct boss. As registrar, Amatussalam collected applications from parents who wanted their children to attend Gateway, and she made sure the necessary paperwork was in order. This information was kept in Gateway's files. In addition, each school site submitted attendance sheets to her once a month. From these, she prepared the student body count and attendance reports, which she gave to Hamed and, if Ghafur asked, to Ghafur.

In spring of 2000, Karl Yoder was asked by people in the financial industry whether he could help structure financing for Gateway. [FN6] Yoder first contacted either Ghafur or Hamed by telephone, then met with them in Fresno, whereupon he became involved in business transactions with them. During his dealings with Gateway, it was Yoder's perception that Ghafur and Hamed were operating **[*15]** Gateway jointly, as a team. This was his perception from general contact with both of them.

> FN6. At the time, Yoder, through his firm Delta Public Finance, was an independent financial advisor to municipal entities, including charter schools. The use of municipal bonds and similar financing by charter schools was then a relatively new field within the larger field of municipal bonds.

In April 2001, Yoder was involved in obtaining a loan for Gateway. This was done by means of a note for $945,000. Wedbush Morgan Securities (Wedbush) underwrote the bond for the funding. At the time, Gateway reported an enrollment of between 500 and 700 students. [FN7]

> FN7. All told, Yoder was involved in four fundings for Gateway. The first, on or about August 28, 2000, was in the amount of $256,000, and was sold to broker-dealer ML Stern & Company. The April 2001 funding was the second one. The third, on or about September 27, 2001, was in the amount of $630,000, and was also sold to Wedbush. It is this funding that is the subject of count 11. The fourth funding, on or about December 19, 2001, was in the amount of $265,000.

. . . .

Near the time Gateway's headquarters moved from its facility on F Street to **[*16]** a site on Shields (which occurred sometime after July 4, 2001), Hamed requested access to the student records and attendance records. Amatussalam saw this as a problem, because she generated the body count reports from the attendance records, and was strict concerning what happened to the documents and who had access to them. The documents detailed which students were prospective students and which students were fully enrolled. Amatussalam did not submit prospective students to FUSD for the purpose of generating ADA funds. The actual student count was submitted by her to Hamed, and it was his responsibility to send that information to FUSD. It was also his responsibility to prepare the ADA reports.

During this time, Amatussalam's working roster, which contained information on all students who applied and not just those who were actually enrolled, was sent to FUSD. When FUSD complained, Hamed and Ghafur asked Amatussalam whether she had sent the list. Ultimately, Hamed's wife admitted sending it. Hamed told his wife not to send anything and not to touch anything she found on anyone's desk. For Amatussalam, this did not explain how Hamed's wife came to have the working roster, as it had **[*17]** not been printed or distributed, but instead was kept on Amatussalam's computer. In Hamed's presence, his wife said that Hamed told her to send the document to FUSD.

Amatussalam reported this incident to Ghafur, who said she would look into it. At some point, Amatussalam paid to have locks put on the file cabinets, and she then kept the student files locked. She also paid for a computer person to come in and network the computers, so that everything that could be accessed without a problem was placed in a shared file, while passwords were assigned to sensitive information. This caused problems, because Hamed wanted access to the files, and staff would not comply. Both Hamed and the facilitator at one of the outside sites asked Amatussalam to unlock her files, but she refused, as documents had been changed, attendance sheets had been altered, and there were files with missing records. Although Amatussalam had no information that Hamed had anything to do with that, it caused her concern when Ghafur announced to the staff of the registration office that Hamed was their immediate supervisor, had the power to hire or fire, and was to receive access to the records as he requested. After the **[*18]** move to the Shields facility, there was no lock on the door to Amatussalam's office, and the file cabinets did not lock. The student enrollment list on Amatussalam's computer remained passworded, however.

On several occasions in July and August 2001-particularly August-Ghafur and Hamed requested

Yoder's assistance in obtaining additional funding for Gateway.

In September 2001, Yoder became involved in securing further funding for Gateway. During that time, he spoke with both Ghafur and Hamed about Gateway's student enrollment numbers. When Yoder received a solicitation from Gateway, formally requesting to borrow an additional amount, he asked that a budget be provided. On September 18, 2001, he received, by means of a facsimile that bore Hamed's name on the cover sheet, Gateway's projected fiscal year 2001-2002 budget. The cover sheet stated that the budget was based on 1,450 students enrolled in the school's population. Yoder then telephoned Hamed and indicated his desire to see a student list. Yoder requested the enrollment list because this funding, unlike the earlier one, was based on actual enrollment as opposed to projections. [FN8] Accordingly, Yoder wanted to see names of students **[*19]** to verify they were actually enrolled, and he told this to Hamed.

FN8. The April 2001 funding was to cover the expected cash flow shortfall in the coming year, based on Gateway's projections in April of what its student count would be in the fall. Thus, neither Delta Public Finance (Yoder's company) nor Wedbush required actual enrollment numbers, aside from the actual enrollment as of April. In conjunction with the April 2001 funding, Yoder received the projected student numbers from Hamed.

In a memorandum from Ghafur dated June 29, 2001, Yoder received a current student count, as well as projections of student counts for the fall. According to Abdul-Hafeez, Ghafur asked her, in June, to make a growth projection, and Abdul-Hafeez prepared something regarding an increase of 300 students. Ghafur subsequently told her that the report was incorrect, and gave it to Hamed. According to Abdul-Hafeez, who conceded she was paraphrasing, Ghafur told Hamed to do whatever was needed to get the loan from Delta. Ghafur and Hamed were the only two who dealt with Delta Finance.

After Yoder spoke to Hamed, he received, by way of a facsimile bearing Hamed's name and what purported to be his signature, **[*20]** an enrollment list showing a count of 1,352 students. [FN9] According to Amatussalam, who could not say whether the signature actually belonged to Hamed, the list was not accurate. For instance, it included students from the Patricia Young, Oscar Romero, Ezra, and Faaidah Learning Centers, none of which were part of Gateway in September 2001. In addition, some of the pages had cut-and-paste lines or areas where it appeared something had been whited out. Part of the document came from Amatussalam's working documents, which she kept on her computer. Thus, some of the student names on the student enrollment list sent to Yoder were the same as those on the student waiting list Amatussalam had created in June 2001, at Ghafur's request, and had sent to Ghafur. In September 2001, Gateway did not have 1,352 students, although actual enrollment was roughly 900. After September 11, the correct figure might have been 701, as two schools were kicked out of their sites. [FN10]

FN9. In the enrollment list Yoder received in conjunction with the September 2001 funding, there were 1,227 student names, but a confirmed student count of 1,352. Yoder's understanding of the difference was the count at the **[*21]** Ezra Learning Center. As the document stated that the student count was confirmed, Yoder's understanding was that those students were enrolled, but the names were incomplete.

FN10. According to enrollment reports submitted by Gateway to FUSD, when Gateway opened in September 2000, it had a total of 167 regular students and 31 independent study students at its various school sites. In May 2001, at the end of the first school year, Gateway had a total of 597 regular students and 83 independent study students at its sites. These were the enrollment numbers; attendance, which was reported to FUSD for generating ADA, was derived from the number of students who actually attended the various schools and was usually lower, given that some enrolled students did not attend on a given day due to illness or other reasons. According to Gateway's enrollment reports for the 2001-2002 school year, Gateway had a total of 701 students for the school year's first attendance period, which ended September 14, 2001. For that report, Gateway did not submit a number for the Patricia Young and Oscar Romero sites, which were no longer affiliated with Gateway, nor did it report the Ezra Learning Center or Faaidah **[*22]** school as being part of Gateway.

When Yoder received the enrollment list, he noticed there was a shortfall between the number of names and the 1,450 figure contained in the projected budget. The main purpose of the document was to verify the actual

enrollment count. Yoder stated this to Hamed and advised him that the enrollment count was crucial for this funding, because enrollment was what determined the money flowing to the school, and the notes could not be repaid without the enrollment that was being shown. When Yoder asked why the 1,352 number did not match the 1,450 figure, Hamed said that 1,450 was the actual student count, but they only had 1,352 names. In addition, Yoder had several conversations, probably on a daily basis, with both Hamed and Ghafur, concerning the need for the funding, the timing of the funding, and the population count. Yoder confirmed that 1,352 was a ″hard″ number as opposed to a projection.

At no time did Hamed say Gateway actually had 701 students enrolled in September 2001, although, in April 2001, Gateway was projecting an enrollment of 700 for the 2001-2002 fiscal year. . . . [I]f Yoder had known Gateway's enrollment in September 2001 was approximately **[*23]** 700, and with the April bond issue already outstanding, he would not have recommended the $630,000 funding to Wedbush. Similarly, if Gateway had received the April funding based on a projected enrollment of 700, then solicited a second loan with a showing that enrollment was still at 700, Yoder would not have recommended the second loan . . . .

In September 2001, Yoder's relationship to Gateway was that of a financial advisor. As such, his duties entailed assisting Gateway in preparing documentation in a financing package and showing that package to broker dealers and investment banks as potential investors. The relationship did not entail acting on Gateway's behalf, but instead acting as intermediary between Gateway and broker/underwriter firms. He contracted with Wedbush in conjunction with the September 2001 funding, and worked primarily with Richard Grossman, a public finance investment banker at Wedbush, in that regard. Yoder passed the student enrollment list on to Wedbush, so Wedbush could use it in its review and decision whether to loan the money.

. . . .

Prior to the September 2001 funding, Grossman spoke with Ghafur and Hamed in order to review the documentation. He contacted **[*24]** Hamed because Hamed was the person in charge of finance for Gateway. When Grossman asked Hamed what the student enrollment and ADA were at that time, since, at the time of the April 2001 funding, Gateway had had 700 students and was expanding, Hamed stated the student enrollment number was 1,350. Grossman asked for documentation, which was sent to Yoder. Yoder provided Grossman with the student enrollment list, dated September 18, 2001, and purportedly from Hamed, that showed an enrollment number of 1,352 students. It was explained to Grossman-he believed by Yoder and Hamed-that the list comprised students who were actually enrolled in Gateway, not a prospective population. In turn, Grossman presented this document to Wedbush's underwriters.

In making the decision to fund and finance, Grossman placed equal significance on the September 2001 actual enrollment figure and on the expected increasing student population. If 701 students would have generated approximately $3.5 million in ADA funds, that would have been enough to cover Gateway's notes and operation of its school facilities. Based on his calculations, Grossman normally still would have recommended that Wedbush issue the bonds. **[*25]** Grossman believed, however, that reference to 701 students described a hypothetical situation, as, to his knowledge, there were never 701 students enrolled at Gateway in September 2001. Had the true enrollment been 701 students, Grossman would not have recommended the issue to Wedbush, because he was told there were 1,350 students.

The student enrollment list was also received by Robert ″Cap″ Harlan of Wedbush. The list was provided by Gateway's financial advisor, Delta Financial. In this respect, Karl Yoder was the individual from Delta Financial with whom Wedbush dealt with respect to the September 2001 funding. Wedbush relied on the information provided to it. The list contained 1,227 individual student names and showed a total student count of 1,352. The student enrollment was ″by far and away″ the most important factor Wedbush used in underwriting, since the source of money that schools can receive-hence, the source of money to service the bond issue debt-is based very strongly on the number of students enrolled, due to ADA funding.

Wedbush created a term sheet for the funding, which gave the basic terms of the transaction, the borrower, the interest rate, the amount borrowed, the **[*26]** maturity date, and the basic materials of issue. The term sheet, which was disseminated to Wedbush's brokers and correspondent brokers, contained a brief description of Gateway that was created by Wedbush and stated that Gateway's enrollment was approximately 1,350. Wedbush obtained this enrollment figure from Gateway's student list, but did not independently try to

verify it. [FN11] If Wedbush had known that Gateway was actually reporting some 700 students, Harlan ″seriously doubt[ed]″ it would have underwritten the September 2001 offering, as that number of students would not have been enough to service both debt issues and allow the school to pay its operating costs. In short, Wedbush relied ″very heavily″ on the 1,352 student number in underwriting the loan. [FN12] Wedbush only cared about confirmed students, not projected increase.

> FN11. Wedbush did not receive anything directly from Gateway, but instead received all communications through Yoder.
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> FN12. According to Harlan, Wedbush took the list of 1,272 actual names as being a very accurate list of Gateway students. He did not see a major difference between that number and the 1,352 total. The most important list was the list with **[*27]** the actual students' names. That list of 1,272 students was enough to support the underwriting.

In September 2001, Sharon Liska was senior vice-president of investments with Wedbush at its branch office in Anchorage, Alaska. As a broker, she advised clients on their portfolios, what to buy, and where to place their money. In this capacity, she regularly had contact with Cap Harlan, manager of Wedbush's bond department in Los Angeles, with respect to the sale of bonds.

In September 2001, Liska, who had 30 to 40 clients who were interested in short-term investments, was contacted by someone from Wedbush's Los Angeles office about Gateway bonds. She in turn contacted Harlan to question him about the bonds, which were for a term of 13 months and paid an unusually high rate of nine percent taxable interest. . . . With respect to Gateway's enrollment, Harlan told Liska that there were 1,500 currently-enrolled students, with expansion to 3,000 to 3,500 within the next few months. [FN13] When she asked him for the exact current enrollment figure, he told her either 1,351 or 1,352. The student enrollment numbers were one of the initial factors on which she relied.

> FN13. Harlan denied ever telling **[*28]** Liska that Gateway had 1,500 students enrolled. Yoder did not recall telling anyone that Gateway had 1,500 students, but admitted he possibly may have done so as an approximation. Yoder had no direct dealings with either the brokers or the investors.

As a result of the information she received from Harlan, Liska contacted those among her clients who were looking for investment-grade, short-term bonds. Eight of these clients-including her father and uncle-were involved in the Gateway funding. These people invested a total of $270,000. [FN14] Liska spoke to each of them individually and told them she had a double A-rated, short-term bond issue . . . . None of Liska's investors requested enrollment figures from her. The investors would have relied on her telling them that there was an increasing demand, which statement would have been made based on the figures Harlan gave her.

> FN14. Liska testified that she had seven clients who invested a total of $260,000. When she was asked to give each individual name and amount, however, there were eight clients who invested a total of $270,000.

Although Ghafur's name was brought up as the person from whom Wedbush got its information, Liska never spoke **[*29]** to anyone with Gateway, nor did anyone from Gateway make any representations directly to her with respect to the bond. She presented her investors with the facts that had been given to her, and they decided whether to invest. She did not undertake independent verification of what Harlan told her . . . . Had she known these were not bridge bonds, were nonrated, and that there was not more backing to them, she would not have bought them. Ultimately, this bond was not satisfied and so the bondholders were never repaid.

In September 2001, Wedbush contacted broker Paul Dixon with an offer involving the Gateway bond, and Dixon worked through Wedbush, with whom he had a longstanding relationship through the securities firm for which he was an independent contractor, on the issue.

Dixon relied on information contained in the term sheet [he received from Wedbush], specifically the student enrollment number for Gateway, which was given as approximately 1,350 . . . .

Based on the term sheet, Dixon contacted several of his clients. He told them that the investment was a school bond issued by a charter school; that the school had a certain number of students and that the state was required to pay **[*30]** a certain amount; and that, based upon the revenues coming in versus the expenditures they showed, it looked like a very solid bond issue. Two agreed it would be a good investment; Karyl Atherton paid $5,000, and Gene and Frances Senger paid $25,000. They relied on the information Dixon gave them, which he received from Wedbush . . . . In terms of the

enrollment number, the investors relied on the fact the term sheet said there were approximately 1,350 students in the sense that, had the number been significantly less, Dixon probably would not have offered them the bond, since in his mind, it would have been a degradation of the security from the first bond issue to the second. . . . If Dixon had been told Gateway had approximately 700 students enrolled at the time of the second offering, it would have meant to him that enrollment was flat or slightly declining and yet the school was coming back for more money. Under such circumstances, he would have decided not to sell the bond.

As the underwriter with respect to the September 2001 funding, Wedbush purchased the bond/note from the issuer (Gateway) and resold it to investors. All told, 17 investors purchased the September 2001 bond, **[*31]** through seven different brokers. Gateway was paid the $630,000, less Wedbush's commission and Yoder's fee, within a few days after the underwriting closed. None of the bondholders received any of their principle on this funding.

Count 12-2000 Income Tax

Hudson's review of records showed that amounts paid to and for the benefit of Ghafur from Gateway's account in 2000 totaled $80,141 .99, of which $70,141.99 was shown as constituting salary. In addition, expenses in the amount of $7,915.13 were paid. The Franchise Tax Board was unable to locate any tax documents filed by Ghafur for tax year 2000. In the opinion of Phillip Frailey, a special agent for the Franchise Tax Board, Ghafur accrued taxable income for that year and should have filed a return.

Count 13-2001 Income Tax

Hudson's review of records showed that amounts paid to and for the benefit of Ghafur from Gateway's account in 2001 totaled $272,648.16, of which $154,021.56 was shown as constituting salary. In addition, expenses in the amount of $13,500 were paid. Although Ghafur filed a state income tax return for 2001, it was Frailey's opinion that she underreported her taxable income for that year.

DEFENSE EVIDENCE

In April 2001, **[*32]** Yoder received a document from either Hamed or Ghafur, stating that Gateway anticipated an increase in enrollment from 550 to 700 students in fiscal year 2001. On or about June 22, 2001, Yoder received a facsimile transmission from Hamed that, unlike the subsequent cover sheet for the list showing a student enrollment of 1,352, did not bear a signature and had a header that included Hamed's name and telephone number. [FN15] On or about June 29, 2001, Yoder received a student list from Ghafur that showed a student count of 1,112, including the waiting list for the main campus at Fruit and Dakota. In light of the September 2001 enrollment list, Yoder believed Gateway had had about 550 students at the end of the fiscal year and, as of April, an enrollment of 700 was being projected for fall. That enrollment projection kept rising, however, so that over the summer, it grew to 1,000, and, by September, Gateway actually had slightly more than 1,300 students enrolled. Gateway never reported to Yoder a student enrollment of 701 in September 2001.

> FN15. Yoder was unable to recall whether other facsimiles he received from Hamed also had a header. He denied creating or altering the facsimile cover **[*33]** sheet for the September 2001 enrollment list, creating any student numbers, or making up any documentation to support the September 2001 funding. He denied signing Hamed's name to the cover sheet.

Yoder did not recall Hamed ever telling him that the student enrollment in September 2001 was exactly 1,352 students, but he did recall Hamed saying in several conversations that the enrollment count was in the range of 1,300 to 1,500. Yoder was certain that what was conveyed to him was a current, actual student count and not a projection or expectation. When the September list said ″student count confirmed″ without listing names, Yoder took it to mean that it was not a projection, but instead the numbers were actual students whose names were not available for that list.

In October, Hamed and Ghafur mentioned that September 11 had impacted enrollment. For the December 2001 funding, Yoder did not have an updated student enrollment list and was working off of the list from the September funding. At an in-person meeting at Gateway in December, Yoder talked to both Ghafur and Hamed about the September 2001 student enrollment list. In December 2001, Hamed told Yoder there were 1,352 students. Yoder **[*34]** did not recall an exact conversation with Ghafur, but it was clearly indicated by both Ghafur and Hamed that the student enrollment list essentially was unchanged. They mentioned that a Sunnyvale school had closed, but that enrollment

definitely was well above 1,000. They did not tell Yoder they had around 700 students; if they had, he would not have been involved in funding in December 2001. Similarly, if they had said they had 701 students in September 2001, he would not have been involved in that funding, either.

As far as Yoder could tell, Ghafur and Hamed co-ran Gateway. Hamed "did more of the nuts and bolts stuff" while Ghafur did "more of the overall directions," but they seemed to him to be equally responsible for the school's operation. Yoder conceded his perception could have been mistaken.

In 2001, Lewis Wiley was director of accounting and payroll for FUSD. As such, his responsibilities included assisting the charter schools with their unaudited actuals. In terms of Gateway, Wiley was in contact mostly with Hamed at first, and then with Islah Abdul-Hafeez. On October 1, 2001, Wiley inquired of Abdul-Hafeez about some of the numbers in the unaudited actuals Gateway had submitted **[*35]** for the fiscal year ending June 30, 2001. Wiley wanted to know why the unaudited actuals were so different from the budget Gateway had submitted. Abdul-Hafeez explained that enrollment had jumped significantly compared to what had been expected, due to the opening of additional sites and new promotions that had attracted more students. She stated that Gateway had had a student enrollment of 300 in September 2000, a student enrollment of 750 in June 2001, and a student enrollment of 1,450 in September 2001. Wiley did not recall anyone from Gateway other than Abdul-Hafeez stating that Gateway had 1,450 students enrolled in September 2001. The 1,450 number raised concerns for Wiley because it was a large amount of growth. However, it was not necessarily unusual for charter schools to have budget projections that were incorrect or discrepancies between their budgets and unaudited actuals, or to have incorrect projected student enrollment figures.

Rommie Horn began working for Gateway just prior to summer 2001. Horn was athletic director and did some substitute teaching. Hamed introduced Horn to Gateway, but it was Ghafur who hired him. Hamed was his immediate supervisor. It was Horn's belief **[*36]** that Ghafur was Hamed's boss. Hamed would say that Ghafur was putting pressure on Hamed to make sure Horn was doing what he was supposed to be doing. Also, whenever Horn had a question regarding subjects such as pay, transferring to a different campus, or going into the classroom instead of being athletic director, Hamed would say he (Hamed) had to check with Ghafur to make sure it was all right.

Horn went to Yoder's office in Sacramento two or three times. Once, in December 2001, was to deliver Christmas presents. The other time was before the beginning of school, in late August or early September. Ghafur asked him to deliver a large manila envelope, about an inch thick, to Yoder. Although she did not say what the envelope contained, she said it was important and needed to get there immediately.

Hamed presented evidence of his good character for truth, honesty, and integrity. He testified on his own behalf that he first met Ghafur in late 1999, when he was already working as a regional manager for One to One Learning Foundation, a charter school. He assisted in putting together a management team and a team of professionals, including Al Uribe, that facilitated the ultimate launching **[*37]** of Gateway, which, at the time, had been chartered, but which had only an administrative staff.

In 2000, Gateway obtained a $250,000 grant from the state. This was the first money the school received, and it was enough to begin organizing. Hamed, who had years of experience in nonprofit business services, recommended to Ghafur and the personnel staff to engage an accountant to ensure full oversight and control of the reporting of finances received from governmental agencies. An accountant was hired, but strictly for payroll. In approximately July 2000, Gateway obtained its first students.

Hamed formally became Gateway's chief administrative officer sometime in 2000. His wife worked as his secretary in a volunteer capacity. Although Hamed had a strong recommendation relationship with Gateway's board, he did not have the power to hire and fire.

Hamed's duties involved administrative oversight of Gateway's sites and departments, and assisting in the day-to-day operations of the organization. With respect to the collection of attendance and student enrollment reports, Hamed had an oversight function in relation to the registrar. Everything was organized to flow through the department of the **[*38]** registrar, and ultimately to Hamed in summary form or whatever specified form he needed to prepare reports for external organizations, primarily FUSD.

Student information was conveyed to outside sources for purposes of ADA funding. For a student to qualify for ADA funding, documents such as birth certificate, immunization record, and acceptable form of identification had to be on file. Based on where X's were placed on the monthly forms Hamed received

from the registrar's office, Hamed could tell how many students qualified for ADA funding. Only students who met all requirements and qualified for ADA funding were reported to FUSD. A student could have been enrolled in Gateway and attending school, but would not have been claimed for ADA funding if the necessary documents were not on file.

The dispute between Hamed and Amatussalam arose because Amatussalam could not provide all of the necessary information on some of the students she was reporting as being enrolled. Hamed refused to report the students who were not verified. This type of problem occurred often. The school sites sent monthly attendance reports to Amatussalam, but were also required to send a duplicate copy to Hamed to **[*39]** calculate the ADA they earned. In some instances, the reports Amatussalam gave Hamed at the end of the month did not reconcile with the figures that had been reported to him through the copies sent by the sites. Hamed had to reduce a number of figures Amatussalam reported, causing philosophical problems between them. When Amatussalam complained to Ghafur, Ghafur instructed her to give Hamed access to the records, but Amatussalam never did. She also changed the locks and put a password on her computer. Hamed was Amatussalam's supervisor only in theory; in reality, all department heads reported directly to the superintendent (i.e., Ghafur) and the board. Because Amatussalam would not give him access to the records, Hamed could only fulfill his reporting duties through the secondary mechanism of the summary reports she provided to him. She provided a monthly body count, which gave him the number and grade level of enrolled students who had accrued ADA funding for the month. The body count was solely numerical and had no names attached. Although Hamed felt Amatussalam was insubordinate on a number of occasions, he did not recall an incident in which she confronted him about sending a working **[*40]** copy of her enrollment list to FUSD. No one in his office, including his wife, had access to Amatussalam's files, and Hamed did not recall any incident in which his wife said he had told her to send the information to FUSD.

On September 19, 2001, Hamed delivered a memorandum to Amatussalam in which he asked for a complete list of students enrolled for the 2001-2002 fiscal year. He made the request because he had heard Abdul-Hafeez tell someone Gateway had 1,450 students and that documents reporting that enrollment were being prepared. Amatussalam complained to Ghafur the day after Hamed made the request. In November, Amatussalam presented Hamed with an enrollment list showing approximately 980 students.

The student list with the attached facsimile cover that purportedly was signed by Hamed, gave ″student count confirmed″ in response to a process undertaken by the registrar's office to have the director of the particular learning center verify whether the parents intended to enroll their children at Gateway. These were not students who were actually enrolled. Similarly, students shown as being on a waiting list were not considered enrolled. Hamed denied compiling the list or extracting **[*41]** it from Amatussalam's computer, or seeing it prior to preparation for trial. He denied signing the facsimile cover sheet, that the document bore his actual signature, and transmitting the document to Yoder.

Hamed may have sent facsimiles to Yoder in September 2001, although he did not recall sending any directly. When Abdul-Hafeez became compliance officer, there was a protocol that mandated that all information sent outside the organization by anyone first had to be reviewed by her and passed on to the superintended before it went out. Thus, if Hamed sent a facsimile, it was with authorization from his supervisor. Facsimiles from Hamed bore a header, which the one to Yoder did not have.

Hamed denied ever telling Grossman that Gateway had 1,352 students enrolled in September 2001. Gateway's enrollment at that time was 701 students. Hamed presented that information to Yoder in September 2001, in the form of a budget based on an actual enrollment of 550 in June 2001, with a projected enrollment of 700 at the beginning of the new academic year. In turn, Hamed received, on Yoder's letterhead, a document showing a bridge loan program for Gateway based on the scenario of an enrollment of 700 **[*42]** for the 2001-2002 fiscal year. Gateway's board asked Hamed also to generate budget scenarios based on enrollment of 1,000 and 1,450 students. These were never representations of actual enrollment. Hamed admitted giving Yoder a student enrollment number of 1,450, but only as a budget projection. Hamed denied that Yoder ever said he needed to confirm the student number or asked for a confirmed student number or list of names. Hamed denied giving Yoder an enrollment list of 1,352 students, which included learning centers he knew were no longer part of Gateway.

Hamed understood Delta Financial to have loaned money to Gateway. His perception of Delta was that it

either represented a financial institution or an institution that had funds available for bridge loans to charter schools. When he signed the intercept letter, which he believed included the $630,000 loan, he was signing to protect Delta and anyone associated with the lending process. He had no idea of the source of the funds or that private investors would be purchasing bonds from Wedbush. Yoder never explained this; there was no discussion between him and Hamed beyond the fact that Yoder would facilitate acquisition of the funds **[*43]** necessary for the bridge loan.

In January 2001, Ghafur and other members of the executive board wrongly accused Hamed of trying to start his own charter school with someone. Until that time, Hamed had maintained the check register for Gateway. He was told he was not to be involved in Gateway's financial affairs, and Ghafur told him he was on probation for 90 days. As he was never told he had been removed from probation, he believed he was still on probation in September 2001. As being placed on probation made him feel despondent and ostracized, he would never have been involved with Ghafur in a scheme to steal money from bondholders. In addition, although he was unsure whether he and Ghafur belonged to the same Muslim sect, they did not have the same Tabliq, meaning the direction in which they focused their attention as far as leadership was concerned. Thus, there were basic ideological differences between them, such that Hamed ″[a]bsolutely″ would not have been involved in a common plan or scheme with her.

Hamed, who was not a member of Gateway's board, attended board meetings when invited by the board to give special reports, including budget. Those sometimes included student enrollment **[*44]** figures as related to budget. Minutes for the October 2, 2001, board meeting, at which Ghafur was present, indicated Gateway had 1,400 students, although the source of that figure was not stated. As chief administrative officer, Hamed had access to enrollment information through the registrar's office. However, the minutes did not show Amatussalam or Abdul-Hafeez as attending that meeting. The only attendees who would have been in a position to give that information were Hamed and Ghafur. The number did not come from Hamed.

Until the beginning of this case, Hamed was chairperson of the nine-member board of a mosque in Fresno. He had held this elected position for two years. In his capacity, he had access to hundreds of thousands of dollars that belonged to the mosque. He neither took, nor was ever questioned about taking, money that did not belong to him. In addition, he previously was treasurer of a mosque in San Francisco for over seven years, and never took, nor was questioned about taking, any of that money. Hamed denied ever trying to defraud anyone in this case; in fact, he tried to protect the lenders by signing the intercept letter.

See Resp't Lodged 1 (some footnotes omitted).

Discussion

I. Jurisdiction [*45] and Venue

A person in custody pursuant to the judgment of a state court may file a petition for a writ of habeas corpus in the United States district courts if the custody is in violation of the Constitution or laws or treaties of the United States. *28 U.S.C. § 2254(a)*; *28 U.S.C. § 2241(c)(3)*; *Williams v. Taylor, 529 U.S. 362, 375, n.7, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. Venue for a habeas corpus petition challenging a conviction is proper in the judicial district in which the petitioner was convicted. *28 U.S.C. § 2241(d)*.

As Petitioner asserts that she is in custody pursuant to a State conviction which violated her rights under the United States Constitution, the Court has jurisdiction over this action. *28 U.S.C. § 2254(a)*. Petitioner was convicted in Fresno County, California, which is within the Eastern District of California, and thus venue is proper in the Eastern District. *28 U.S.C. § 84*; *28 U.S.C. § 2241(d)*.

II. Standard of Review

On April 24, 1996, Congress enacted the Anti-terrorism and Effective Death Penalty Act of 1996 (″AEDPA″), which applies to all petitions for a writ of habeas corpus filed after the statute's enactment. *Lindh v. Murphy, 521 U.S. 320, 326-27, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997)*; *Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997)*. **[*46]** The instant petition was filed after the enactment of AEDPA and is consequently governed by its provisions. See *Lockyer v. Andrade, 538 U.S. 63, 70, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)*. Thus, the petition ″may be granted only if [Petitioner] demonstrates that the state court decision denying relief was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'″ *Irons v. Carey, 505 F.3d 846, 850 (9th Cir. 2007)* (quoting *28 U.S.C. § 2254(d)(1)*), overruled in part on other grounds, *Hayward v. Marshall, 603 F.3d 546, 555 (9th Cir. 2010)* (en banc); see *Lockyer, 538 U.S. at 70-71*.

Title *28 of the United States Code, section 2254* remains the exclusive vehicle for Petitioner's habeas petition as Petitioner

is in the custody of the California Department of Corrections and Rehabilitation pursuant to a state court judgment. See *Sass v. California Board of Prison Terms, 461 F.3d 1123, 1126-27 (9th Cir. 2006)* overruled in part on other grounds, *Hayward, 603 F.3d at 555*. As a threshold matter, this Court must "first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Lockyer, 538 U.S. at 71* **[*47]** (quoting *28 U.S.C. § 2254(d)(1)*). In ascertaining what is "clearly established Federal law," this Court must look to the "holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." Id. (quoting *Williams, 529 U.S. at 412*). "In other words, 'clearly established Federal law' under *§ 2254(d)(1)* is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Id. Finally, this Court must consider whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." *Id. at 72* (quoting *28 U.S.C. § 2254(d)(1)*). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams, 529 U.S. at 413*; see also *Lockyer, 538 U.S. at 72*. "Under the 'unreasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing **[*48]** legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams, 529 U.S. at 413*. "[A] federal court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id. at 411*. A federal habeas court making the "unreasonable application" inquiry should ask whether the State court's application of clearly established federal law was "objectively unreasonable." *Id. at 409*.

Petitioner bears the burden of establishing that the state court's decision is contrary to or involved an unreasonable application of United States Supreme Court precedent. *Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996)*. Although only Supreme Court law is binding on the states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a state court decision is objectively unreasonable. *Clark v. Murphy, 331 F.3d 1062, 1072 (9th Cir. 2003)* ("While *only* the Supreme Court's precedents are binding on the Arizona court, and only those precedents **[*49]** need be reasonably applied, we may look for guidance to circuit precedents"); *Duhaime v. Ducharme, 200 F.3d 597, 600-01 (9th Cir. 1999)* ("[B]ecause of the 1996 AEDPA amendments, it can no longer reverse a state court decision merely because that decision conflicts with Ninth Circuit precedent on a federal Constitutional issue . . . . This does not mean that Ninth Circuit case law is never relevant to a habeas case after AEDPA. Our cases may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help us determine what law is 'clearly established'"). Furthermore, the AEDPA requires that the Court give considerable deference to state court decisions. The state court's factual findings are presumed correct. *28 U.S.C. § 2254(e)(1)*. A federal habeas court is bound by a state's interpretation of its own laws. *Souch v. Schaivo, 289 F.3d 616, 621 (9th Cir. 2002)*.

The initial step in applying AEDPA's standards is to "identify the state court decision that is appropriate for our review." *Barker v. Fleming, 423 F.3d 1085, 1091 (9th Cir. 2005)*. Where more than one State court has adjudicated **[*50]** Petitioner's claims, a federal habeas court analyzes the last reasoned decision. Id. (citing *Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)* for the presumption that later unexplained orders, upholding a judgment or rejecting the same claim, rests upon the same ground as the prior order). Thus, a federal habeas court looks through ambiguous or unexplained state court decisions to the last reasoned decision to determine whether that decision was contrary to or an unreasonable application of clearly established federal law. *Bailey v. Rae, 339 F.3d 1107, 1112-13 (9th Cir. 2003)*. Petitioner raised each of her three claims brought in the instant petition through a direct appeal to the California Court of Appeal, which affirmed the judgment in a reasoned opinon. See Resp't Lodged 1. Petitioner's claims were then raised in a petition for review to the California Supreme Court, which summarily denied review. See Resp't Lodged 2. The California Supreme Court, by its "silent order" denying review, is presumed to have denied the claims presented for the same reasons stated in the opinion of the lower court. *Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991)*. As the California Court of Appeal was the last **[*51]** state court to issue a reasoned opinion; the Court analyzes whether the appellate court's decision is an objectively unreasonable application of federal law.

III. Review of Petitioner's Claims

The petition for writ of habeas corpus sets three grounds for relief, contending that her rights were violated by the superior court. Petitioner asserts that: (1) there was insufficient evidence in support of her conviction; (2) the

trial court's failure to provide a proper jury instruction amounted to a violation of her rights to due process; and (3) the trial court erred in failing to find a prima facie showing of discrimination by the Prosecution's improper strike of a juror.

A. Ground One: Sufficiency of the Evidence

Petitioner contends her due process rights were violated as there was insufficient evidence to show she directed, authorized, or participated in the false representation of student enrollment with respect to the September 2001 funding. More specifically, she argues that the evidence was insufficient to sustain either her conviction for grand theft on count 11 or the jury's finding as true, special allegations one (Penal Code § 186.11, subd. (a)(2)) and four (Penal Code § 12022.6, subd. (a)(2)). **[*52]** The California Court of Appeal rejected Petitioner's claim, finding that there was sufficient evidence to support the conviciton. See Resp't Lodged 1.

"[T]he *Due Process Clause of the Fourteenth Amendment* protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Jackson v. Virginia, 443 U.S. 307, 314, 99 S. Ct. 2781, 61 L. Ed. 2d 560, (1979)* (quoting *In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368, (1970)*. "A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." *Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005)* (noting that under AEDPA, a petition for habeas corpus may only be granted where the state court's application of Jackson was objectively unreasonable). Thus, a state prisoner is only entitled to habeas relief on this ground where no rational trier of fact could have found proof beyond a reasonable doubt based on the evidence adduced at trial. *Jackson, 443 U.S. at 324*; see *McDaniel v. Brown, U.S. , , 130 S.Ct. 665, 667, 175 L.Ed.2d 582, 584 (2010)* (per curiam).

Pursuant **[*53]** to the Supreme Court's holding in Jackson, the test to determine whether a factual finding is fairly supported by the record is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson, 443 U.S. at 319*; see *Lewis v. Jeffers, 497 U.S. 764, 781, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990)*; *Bruce v. Terhune, 376 F.3d 950, 956-957 (9th Cir. 2004)* (quoting *Jackson, 443 U.S. at 319*) (stating "Jackson cautions reviewing courts to consider the evidence 'in the light most favorable to the prosecution'"). Where the record supports conflicting inferences, a federal habeas court "must presume-even if it does not affirmatively appear in the record-that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson, 443 U.S. at 326*. Additionally, a jury's credibility determination is "entitled to near-total deference under Jackson," (*Bruce, 376 F.3d at 957*), as assessing the credibility of witnesses is generally beyond the scope of a Jackson review. *Schlup v. Delo, 513 U.S. 298, 330, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)*. Lastly, a federal habeas court must presume **[*54]** the correctness of the state court's factual findings. *28 U.S.C. § 2254(e)(1)*; *Kuhlmann v. Wilson, 477 U.S. 436, 459, 106 S. Ct. 2616, 91 L. Ed. 2d 364, (1986)*. This presumption of correctness applies to a state appellate court's determinations of fact as well as those of a state trial court. *Tinsley v. Borg, 895 F.2d 520, 525 (9th Cir. 1990)*.

Sufficiency of evidence claims are judged by "the substantive elements of the criminal offense as defined by state law." *Jackson, 443 U.S. at 324, n. 16*. Petitioner was convicted of theft by false pretenses pursuant to California Penal Code section 487. As the California Court of Appeal stated in affirming Petitioner's conviction, theft sounding in false pretenses requires three elements-namely: "(1) The making of a false representation; (2) knowledge that the owner was actually defrauded and that he parted with his property; and (3) proof that the owner was actually defrauded and that he parted with his property in reliance on false representations. [Citations.]" See Resp't Lodged 1 at 23. As noted by the Court of Appeal,

> A defendant is guilty of theft by false pretenses if he or she made a false representation *or intentionally caused one to be made*. . . . 'A principal, in order **[*55]** to be held criminally liable, must be shown to have knowingly and intentionally aided, *advised or encouraged* the criminal act committed by the agent.'

See Resp't Lodged 1 at 23 (citations omitted) (emphasis added).

The Court of Appeal observed that while there was no direct evidence presented that Ghafur was involved in Hamed's falsely representing enrollment figures, "there was ample circumstantial evidence, however, from which a rational trier of fact could have concluded she was knowingly and purposely involved, and hence was criminally liable." See Resp't Lodged 1 at 24. The Court of Appeals stated:

> According to Islah Abdul-Hafeez, in June 2001, Ghafur had her prepare budget projections based on projected

student increase. Abdul-Hafeez subsequently received a telephone call from Ghafur, telling her that Abdul-Hafeez's report was incorrect. Abdul-Hafeez's understanding was that her report was ″axed,″ and Ghafur gave the assignment to Hamed. Ghafur told Hamed to do whatever was needed to get the loan from Delta . . . .

In late June 2001, after the April 2001 funding, Ghafur sent Karl Yoder what her cover memorandum termed the current student count for the 2001-2002 school year, with **[*56]** a waiting list for the main campus and student counts for new sites. The attached lists, which were shown as being confirmed student projections, gave a count of 1,112 students. During July and August-mostly in August-both Ghafur and Hamed made several requests to Yoder about obtaining funding, following which Yoder had conversations with Hamed about the number of students Gateway had. Hamed then provided a budget based on 1,450 students, and, when Yoder asked for the names of actual students and not a projection, a list showing an enrollment count and verification of 1,352 students. During this time, Yoder had several conversations-probably on a daily basis-with both Hamed and Ghafur, concerning the need for the funding, the timing of the funding, and about the population count. Although he did not recall a specific conversation with Ghafur about needing the actual student numbers as opposed to a projection, it was an extremely important point because the enrollment count would be critical in repayment of the notes. It was Yoder's impression that Ghafur and Hamed were operating Gateway as a joint management team . . . .

. . . .

Gateway's board minutes for October 2, 2001, showed a reference **[*57]** to Gateway having 1,400 students. Ghafur attended that meeting. Of those who attended that meeting, only Ghafur and Hamed would have been in a position to give that information.

According to Rommie Horn, who worked for Gateway in September 2001, Ghafur was Hamed's boss. Whenever Horn had a question about something, Hamed would have to check with Ghafur . . . .

Hamed denied sending Yoder the student list showing an enrollment of 1,352 students. When he sent a facsimile, however, it would have been with the authorization of his superior. He was subject to a protocol mandating that all information going outside the organization had to first be reviewed by Abdul-Hafeez and then go on to the superintendent before it went out. Ghafur was Gateway's superintendent and Hamed's superior. Hamed followed this policy ″[t]o the letter of law.″

From the foregoing evidence, a rational trier of fact could have inferred that Hamed inflated the student enrollment figures, for purposes of securing the September 2001 funding, with Ghafur's knowledge and at her behest. This is especially true since jurors reasonably could have concluded Hamed had no personal motive for misrepresenting Gateway's student enrollment **[*58]** in order to obtain funding, aside from the motive all Gateway employees presumably had-to keep the school going so that they could continue to receive their salaries. Ghafur, by contrast, had the motive of obtaining more funding so that she could continue to use the school's money as her own personal slush fund, something she had been doing well in advance of the September 2001 funding.

See Resp't Lodged 1 at 24-25.

Initially the Court notes that it must accept the appellate court's findings regarding the requirements necessary to support a conviction under California Penal Code section 12022.1(a)(1). See *Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005)* (per curiam) (stating that ″a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus″); see also *Musladin v. Lamarque, 555 F.3d 830, 838 n. 6 (9th Cir.2009)* (finding that habeas court must presume that state courts know and follow the law and that state-court decisions be given the benefit of the doubt under AEDPA deferential standards). Additionally, the Court notes that in reviewing sufficiency of evidence claims, California courts expressly **[*59]** follow the standard articulated by the United States Supreme Court in Jackson. See *People v. Smith, 37 Cal.4th 733, 738-739, 37 Cal. Rptr. 3d 163, 124 P.3d 730 (2005)*; see also *People v. Catlin, 26 Cal.4th 81, 139, 109 Cal. Rptr. 2d 31, 26 P.3d 357 (2001)*. Thus, the relevant question before a federal habeas court ″remains whether the state court in substance made an objectively unreasonable application of the *Jackson* standards for sufficiency of the evidence.″ Id.

The Court finds that the state court's decision was not an objectively unreasonable application of the Jackson standard. As the appellate court noted, there was ample circumstantial evidence to find that Ghafur not only had knowledge that Hamad had inflated the crucial enrollment figures but that she had authorized and encouraged Hamad to do so. In structuring the loan, Karl Yoder testified that he had daily

conversations with both Ghafur and Hamed concerning the ″need for the funding, about the timing of the funding, and about the [student] population count.″ See Reporter's Transcript (″RT″) at 3190. Additionally, Yoder testified that in September of 2001, Hamed provided him with actual student enrollment figures which indicated 1352 students were actually enrolled at the school for the fall **[*60]** of 2001 when the verified figures were substantially less. See RT at 3185-3186, 3188-90, 3198, 6071, 6243. Though Hamed denied providing the inflated figures to Yoder, he also testified he *may* have sent a fax to Yoder in September of 2001, but it was protocol for all outgoing correspondence to be reviewed by Ghafur prior to being sent. See RT 6060, 6067-68, 6071. Further, according to the testimony of Islah Abdul-Hafeez, Ghafur had told Hamed to do ″whatever was necessary to get the loan.″ See RT 3878-79. Finally, school board meeting minutes for October 2, 2001 indicated actual enrollment figures of 1400 students were discussed and the minutes indicate that both Ghafur and Hamed were present. See RT 6341-43. Of those present at the meeting, only Hamed and Ghafur would have had access to the actual enrollment figures. See RT 6343. While evidence produced at the trial also supported a finding of not guilty, such evidence is immaterial as the Jackson standard of review presumes the trier of fact resolved all conflicts of evidence in favor of the prosecution. *Jackson, 443 U.S. at 326*. In light of the substantial evidence presented at trial, the Court finds Petitioner is not entitled to **[*61]** relief on this ground.

B. Ground Two: Trial Court's Failure to Provide Jury Instructions

Petitioner argues the trial court erred in refusing to provide jury instructions to define the phrase ″common scheme or plan″ as utilized in Penal Code § 12022.6, (Special Allegations Nos. 3 and 4).

With regards to these enhancement allegations, the jury was instructed as follows:

> 'And Special Allegation Number 3. If you find Ms. Ghafur guilty of any of the crimes charged in counts one through eleven, you must then decide whether the People have proved the additional allegation that the value of the property taken was more than $50,000.'
>
> 'To prove this allegation, the People must prove that, one, in the commission of the crime, the defendant took property; two, . . . when the defendant acted, she intended to take the property; and, three, the loss caused by the defendant's taking the property was greater than $50,000.'
>
> '. . . If you find Ms. Ghafur guilty of more than one crime, you may add together the loss from each crime to determine whether the total loss from all the crimes was more than $50,000. If the People prove that, (a), Ms. Ghafur intended to and did take property in each crime, and (b), **[*62]** each crime arose from a common scheme or plan.'

See Resp't Lodged 1 at 26.

The instructions provided for special allegation No. 4 were identical except that the $50,000 loss was increased to reflect $150,000. See Resp't Lodged 1 at 26.

During the jury instruction conference, Petitioner objected to these instructions as they failed to define ″common scheme or plan″ as used in the section 12022.6 enhancement allegation. See Resp't Lodged 1 at 27. However, the trial court refused Petitioner's request to define the phrase. Id. During deliberations, the jury ″did not seek any clarification or guidance with respect to the meaning of ″common scheme or plan.″ Id.

On direct appeal Petitioner argued that because ″common scheme or plan″ had ″distinct, technical meaning,″ the trial court had erred in failing to define the phrase See Resp't Lodged 1 at 28. According to Petitioner, the phrase was ″distinct″ because the phrase was also used in California Evidence Code Section 1101. See Resp't Lodged 1 at 28. In support of her contention, Petitioner relied on *People v. Ewoldt, 7 Cal.4th 380, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (1994)* which addressed Section 1101 and the admission of evidence of a ″common scheme or plan″ in proof of the charged **[*63]** offense. *People v. Ewoldt, 7 Cal.4th 380, 401-02, 27 Cal. Rptr. 2d 646, 867 P.2d 757*; see also Cal. Evid.Code § 1101. However, the Court of Appeal rejected Petitioner's contentions and instead found the phrase ″common scheme or plan″ (as used in section 12022.6) was within the jurors' common understanding. See Resp't Lodged 1 at 28-29. Citing to Ewoldt, the Court of Appeal stated:

> Ewoldt states: '[I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' . . . 'To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts . . . .' ¶ *We see no difference between the dictionary meaning and the usage of the term in* Ewoldt. The

> touchstone is whether the acts are pursuant to a plan, or merely random or spontaneous. The phrase ″common scheme or plan,″ as used in everyday, nonlegal parlance, conveys this meaning.

See Resp't Lodged 1 at 28 (italics added).

In sum, the Court of Appeal found **[*64]** that the phrase ″common scheme or plan,″ as used in section 12022.6, was within the common understanding of jurors. See Resp't Lodged 1 at 29. The failure to specifically define it was therefore not error and, even assuming it was, the error was harmless. See Resp't Lodged 1 at 29. The Court finds the Court of Appeal's rejection of Petitioner's claim regarding the instruction was not objectively unreasonable.

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process. *Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)*; *Clark v. Brown, 450 F.3d 898, 904 (9th Cir. 2006)*, cert. denied, *549 U.S. 1027, 127 S. Ct. 555, 166 L. Ed. 2d 423 (2006)*. The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. *Estelle v. McGuire, 502 U.S. at 72*. Furthermore, even if it is determined that the instruction violated due process, a petitioner can only obtain relief if the instruction ″had substantial and injurious effect or influence in determining the jury's verdict.″ *Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)* **[*65]** (quoting *Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557, (1946)*).

Petitioner claim that her due process rights were violated by virtue of the exclusion of the special definition of ″common scheme or plan″ lacks merit for at least two reasons. First, as the Court of Appeals analysis correctly found, the phrase ″common scheme or plan″ as used in section 12022.6 is commonly understood and the record reflects no indication of the jury's need for further instruction regarding the phrase. See *U.S. v. Hernandez-Escarsega, 886 F.2d 1560, 1571-72 (9th Cir. 1989)* (stating that no special definition is needed for words and phrases in statutes unless they are outside the common understanding of jurors, technical, or ambiguous).

Second, even assuming the existence of some constitutional error, the instructions as given did not so infect the entire trial that the resulting conviction violated due process. The undersigned agrees with the Court of Appeal's finding there was ample evidence that Petitioner, in committing the various charged offenses, had done so in pursuit of an unlawful ″common scheme or plan″ accomplished for personal gain. See Resp't Lodged 1 at 29. Petitioner's plan included the use **[*66]** of public funds to pay her ″personal debts and obligations″ which included (but was not limited to) debts related to: (1) Petitioner's purchase of real property, (ie. her personal residence); and (2) Petitioner's auto loan obtained through Cosomopolitan Finance to finance the purchase of her personal vehicle. See Resp't Lodged 1 at 5-6. Further, testimony of investigative auditor, Edward Hudson, confirmed these payments were made with public funds. See RT 4640, 4643-44, 4658-60. In light of the compelling evidence against her, Petitioner has not shown that the trial court's failure to specially define the challenged phrase had a substantial and injurious effect or influence in determining the jury's verdict. Accordingly, any alleged error in the instructions was harmless under Brecht.

C. Ground Three: Removal of a Minority Juror

Petitioner claims that the trial court erred in failing to find ″that a prima facie case of discrimination was shown by the Prosecution's exercise of a peremptory challenge to excuse the only African-American juror seated . . . .″ See P&A in Support of Petition (Doc. 2) at p. 33.

A prosecutor's discriminatory use of peremptory challenges on the basis of race violates **[*67]** the *equal protection clause of the United States Constitution*. *Miller-El v. Dretke, 545 U.S. 231, 237-40, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)*; *Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)*. Indeed, ″the 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'″ *Williams v. Runnels, 432 F.3d 1102, 1107 (9th Cir. 2006)* (quoting *United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994)*, cert, denied, *513 U.S. 891, 115 S. Ct. 239, 130 L. Ed. 2d 162 (1994)*); *Snyder v. Louisiana, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)*.

″Batson provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race.″ *Snyder, 552 U.S. at 476*, (internal quotation marks and citations omitted); *Batson, 476 U.S. at 96-98*. ″First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race.″ *Rice v. Collins, 546 U.S. 333, 338, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006)*; *Batson, 476 U.S. at 96-97*. ″Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes.″ *John-*

son v. California, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) **[*68]** (quoting Batson, 476 U.S. at 94); Snyder, 552 U.S. at 476-77. ″Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.'″ Johnson, 545 U.S. at 168 (quoting Elem, 514 U.S. at 767); Batson, 476 U.S. at 98. ″This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'″ Collins, 546 U.S. at 338 (quoting Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)).

In addition to contending that she had demonstrated the required prima facie showing, Petitioner argues the trial court erred in requiring heightened standards for the showing by: (1) requiring a ″reasonable″ inference of discrimination as opposed to lessor showing of a ″mere inference″; and (2) finding ″a pattern of discriminatory strikes″ was a prerequisite to the prima facie showing. See P&A in Support of Petition (Doc. 2) at p. 34-36. The Court notes that in reviewing a Petitioner's habeas claims, the state trial court rulings are not examined directly if, **[*69]** as is the case here, a higher court has issued a reasoned decision on direct appeal. Barker v. Fleming, 423 F.3d 1085, 1091 (9th Cir. 2005). Rather, the Court must analyze the last reasoned decision, namely that of the California Court of Appeal to determine whether its denial of Petitioner's claim was contrary to or involved an unreasonable application of clearly established federal law. Bailey v. Rae, 339 F.3d 1107, 1112-13 (9th Cir. 2003). As discussed below, the Court of Appeals properly denied Petitioner's claim.

To establish a prima facie case of racial discrimination injury selection, Petitioner must show that (1) the removed prospective juror is a member of a cognizable group; (2) the prosecution exercised a peremptory challenge to remove the juror; and (3) ″the facts and any other relevant circumstances raise an inference″ that the challenge was racially motivated. Batson, 476 U.S. at 96. The first two elements are undisputed in Petitioner's case because the prosecutor used a peremptory challenge to remove F.C., an African American woman, from the jury pool. See RT at 111.

For the third element, the court of appeals reasonably concluded that the facts presented at trial did **[*70]** not raise an inference that the prosecutor's challenge was racially motivated. The Court of Appeals stated:

> ″'[W]e have reviewed the record and, like the United States Supreme Court in Johnson . . . [we] are able to apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror on the basis of race.' [Citation.]″
>
> We find no such inference here. Although the establishment of a prima facie case does not depend on the number of prospective jurors challenged (see People v. Moss (1986) 188 Cal.App.3d 268, 277, 233 Cal. Rptr. 153), as ″[t]he exclusion by peremptory challenge of a single juror on the basis of race or ethnicity is an error of constitutional magnitude″ (People v. Silva (2001) 25 Cal.4th 345, 386, 106 Cal. Rptr. 2d 93, 21 P.3d 769, italics added), the requisite showing is not made merely by establishing the excused prospective juror was a member of a cognizable group. [Citations].
>
> . . . Although circumstances may be imagined in which a prima facie case could be shown on the basis of a single excusal, in the ordinary case, including this one, to make a prima facie case after the excusal of only one or two members of a group is very difficult. [Citation.]″ (Id. at p. 598, fn. 3.) **[*71]** The fact F.C. was the only African-American prospective juror to have been considered at the time of her removal is not dispositive (People v. Guerra, supra, 37 Cal.4th at p. 1101; see People v. Williams (2006) 40 Cal.4th 287, 311, 52 Cal. Rptr. 3d 268, 148 P.3d 47); as we have noted, the trial jury included an African-American, which circumstance, while similarly not conclusive, weighs against the finding of a prima facie case. [Citations].
>
> Moreover, the record discloses reasons other than racial or group bias for a prosecutor to challenge F.C. Her answers, whether curt and abrupt or not, certainly may properly be characterized as short and practically monosyllabic. This reasonably could have raised red flags in the prosecutor's mind concerning her attitude toward court proceedings in general or this case in particular. More importantly, this was a complicated case. Any prosecutor reasonably could have believed, given the complexity of the evidence, that someone who had never been employed outside the home would not be a desirable juror.
>
> . . . [W]e have concluded that the evidence alluded to by defendant in the trial court did not support such an inference, nor was such an inference supported by the challenged juror's **[*72]** own statements or anything else in ' ″the totality of the relevant facts″ ' [citation] that we have seen in our examination of the record. . . .″ [Citation].

See Resp't Lodged 1 at 21-22 (footnotes omited).

The Court of Appeals applied the correct "raise an inference" standard in determining whether Petitioner established a prima facie case of prosecutorial discrimination. Thus the Court of Appeals determination is entitled to a "presumption of correctness" on federal habeas review. *Fernandez v. Roe, 286 F.3d 1073, 1077 (9th Cir.)*, cert. denied, *537 U.S. 1000, 123 S. Ct. 514, 154 L. Ed. 2d 395 (2002)*; *Wade v. Terhune, 202 F.3d 1190, 1195 (9th Cir. 2000)*.

In determining whether the party challenging the peremptory strike has succeeded at step one of the Batson test, a reviewing court "must consider the totality of relevant circumstances." *Tolbert, 190 F.3d 985, 988 (9th Cir. 1999)*; *Boyd v. Newland, 467 F.3d 1139, 1146-47 (9th Cir. 2006)*. One method courts may assess that the party challenging the strike has shown an inference of discrimination is "comparative juror analysis." *Boyd, 467 F.3d at 1147-49* (stating that "comparative juror analysis is an important tool that courts should use on appeal"); see also *Crittenden v. Ayers, 624 F.3d 943, 956 (9th Cir. 2010)* **[*73]** ("[C]omparative juror analysis may be employed at step one to determine whether the petitioner has established a prima facie case of discrimination."); see also *United States v. Collins, 551 F.3d 914, 921 (9th Cir. 2009)* ("Comparative juror analysis involves comparing the characteristics of a struck juror with the characteristics of other potential jurors particularly those jurors whom the prosecutor did not strike").

Here the record suggests that a comparison of Petitioner's characteristics to those characteristics of other jurors weighs against Petitioner's claim. Responding to the Prosecutor's questions, F.C. indicated that she had not worked outside the home as she stated she was a "stay-at-home-mom." See RT at 37-38. However as noted by the Court of Appeal, "it appears all jurors [who were ultimately selected for trial] had at least some employment or business experience" and that the Prosecutor had exercised his second peremptory challenge against a prospective juror who had also been a homemaker. See Resp't Lodged 1 at 22, fn. 33. Thus it cannot be said that this case is one where "two or more potential jurors share[d] the same relevant attributes (here, the absence of work experience) **[*74]** but the prosecutor . . . challenged only the minority juror." *Collins, 551 F. 3d at 922*. Moreover, as the Court of Appeals stated: "any prosecutor reasonably could have believed, given the complexity of the evidence, that someone who had never been employed outside the home would not be a desirable juror." See Resp't Lodged 1 at 22.

Apart from her contentions regarding the trial court's error, Petitioner's claim rests solely on the fact that F.C. was the only black prospective juror and the prosecutor exercised a peremptory challenge against her. However, this is insufficient to raise an inference of discrimination. *Wade, 202 F.3d at 1198*; *Tolbert, 190 F.3d at 988*. "[T]he striking of one juror of a cognizable racial group does not by itself raise an inference of discriminatory purpose." *Tolbert, 190 F.3d at 988*; *Wade, 202 F.3d at 1198* (quoting *Vasquez-Lopez, 22 F.3d at 902* and stating "'[T]he fact that the juror was the one Black member of the venire does not, in itself, raise an inference of discrimination'").

Accordingly, the California Court of Appeal's finding that Petitioner had not raised the inference that the prosecutor had excused the juror on the basis of race was neither contrary **[*75]** to, nor an unreasonable application of, clearly established federal law.

RECOMMENDATION

Accordingly, the Court RECOMMENDS that:

1. The petition for writ of habeas corpus be DENIED WITH PREJUDICE; and

2. The Clerk of the Court be DIRECTED to enter Judgment for Respondent; and

3. A Certificate of Appealability be DENIED.

This Findings and Recommendation is submitted to the Honorable Oliver W. Wanger, United States District Court Judge, pursuant to the provisions of *28 U.S.C. § 636(b)(1)(B)* and *Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California.* Within thirty (30) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within fourteen (14) court days after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to *28 U.S.C. § 636(b)(1)(C)*. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991)*.

IT **[*76]** IS SO ORDERED.

Dated: February 8, 2011

/s/ John M. Dixon

UNITED STATES MAGISTRATE JUDGE

Neutral
As of: October 22, 2015 11:50 PM EDT

Ghafur v. California

United States District Court for the Eastern District of California

September 10, 2015, Decided; September 10, 2015, Filed

CASE NO. 1:13-CV-1282 AWI JLT (HC)

Reporter
2015 U.S. Dist. LEXIS 120852

KHADIJAH GHAFUR, Petitioner v. PEOPLE OF THE STATE OF CALIFORNIA, et al., Respondents

Prior History: *Ghafur v. California, 2013 U.S. Dist. LEXIS 116583 (E.D. Cal., Aug. 16, 2013)*

Core Terms

successive petition, courts, certification, recommended, disguised, contends, ineffective assistance of counsel, federal habeas corpus, alibi witness, requirements, exculpatory, proceedings, introduce, witnesses, relates, argues

Counsel: **[*1]** ***Khadijah Ghafur***, Petitioner, Pro se, Fresno, CA.

For Larry Perkins, Probation Officer, Respondent: Brian George Smiley, LEAD ATTORNEY, Office Of The Attorney General, Department of Justice, Sacramento, CA.

Judges: Anthony W. Ishii, SENIOR DISTRICT JUDGE.

Opinion by: Anthony W. Ishii

Opinion

ORDER ON RULE 60(b) MOTION

(Doc. No. 27)

On January 16, 2014, the Magistrate Judge issued a Findings and Recommendation ("F&R") that recommended denying Petitioner's *28 U.S.C. § 2254* petition. See Doc. No. 23. The F&R recommended a denial because Petitioner had previously filed a *§ 2254* petition, and she had not received permission from the Ninth Circuit Court of Appeals to file a successive petition. See id.

On April 4, 2014, after no objections to the F&R had been filed, the Court adopted the F&R and dismissed Petitioner's petition. See Doc. NO. 25. Judgment was entered the same day. See Doc. No. 26.

On February 2, 2015, Petitioner filed this Rule 60(b) motion that challenged the denial of her *§ 2254* petition.[1] See Doc. No. 27. For unknown reasons, Petitioner improperly filed this motion with the Central District of California, which then transferred the motion to this Court. See Doc. No. 27-1. In her Rule 60(b) motion, Petitioner contends that she received ineffective assistance of counsel **[*2]** because counsel did not introduce exculpatory evidence and witnesses. See id. Petitioner contends that she was erroneously denied the opportunity to file a successive petition due to the "July 31, 2014 order." Id. Petitioner argues that cases from state courts in Pennsylvania and New Jersey render reliance *28 U.S.C. § 2244(b)(2)* improper. See id. Petitioner contends that an evidentiary hearing regarding her trial counsel's failure to call alibi witnesses is necessary. See id.

Discussion

It is not clear that Petitioner is even attempting to obtain relief from the April 4, 2014 order and judgment in this Court. In her Rule 60(b) motion, Plaintiff references a July 31, 2014 order that denied her the right to file a successive petition. There is no such order in this Court's docket. Petitioner's reference to a July 31, 2014 order and her description of that order suggests that Plaintiff may have filed a request with the Ninth Circuit Court of Appeals to file a successive petition. If Petitioner's Rule 60(b) motion relates to an order by the Ninth Circuit, then her Rule 60(b) motion should not have been filed with either the Central District **[*3]** or this Court; it should have been directed to the Ninth Circuit. As lower courts, federal district courts have no authority over federal circuit courts. To the extent that Petitioner's Rule 60(b) motion relates to an order of the Ninth Circuit, this Court could not grant Petitioner relief.

Assuming that Petitioner is seeking relief from this Court's April 4, 2014 order and judgment, relief is improper. *28*

[1] The Court notes that Petitioner does not indicate which subsection of ***Rule 60(b)*** she is attempting to invoke.

U.S.C. § 2244(b) limits the ability of a federal habeas corpus petitioner to file successive habeas corpus petitions, unless certain narrow requirements are met. *Jones v. Ryan, 733 F.3d 825, 834 (9th Cir. 2013)*. A petitioner seeking to meet § 2244(b)'s requirements for a success petition must do so with the appropriate Circuit Court of Appeals, and receive certification to proceed with a successive petition from that Circuit Court of Appeals. See 28 U.S.C. § 2244(b); *Gonzalez v. Crosby, 545 U.S. 524, 528, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)*. Because of § 2244(b)'s stringent standards, habeas petitioners sometimes attempt to disguise a successive § 2254 petition as a Rule 60(b) motion. See *Jones, 733 F.3d at 834*. A legitimate Rule 60(b) motion will attack a "'defect in the integrity of the federal habeas proceedings,' while a second federal habeas corpus petition 'is a filing that contains one or more 'claims,'' defined as 'asserted federal bases for relief from a state court's judgement of conviction.'" Id. (quoting **[*4]** *Gonzalez, 545 U.S. at 530, 532)*.

Essentially, "a motion that does not challenge the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably, is raising a 'claim' that takes it outside the purview of *Rule 60(b)*." *United States v. Washington, 653 F.3d 1057, 1063 (9th Cir. 2011)*. Here, Petitioner generally disagrees with the Court's prior reliance on § 2244(b), and argues that she received ineffective assistance of counsel because counsel did not introduce exculpatory witnesses and evidence, including an alibi witness. These are "claims" for purposes of § 2244(b). See *Jones, 733 F.3d at 834*; *Washington, 653 F.3d at 1063*. Therefore, Petitioner's Rule 60(b) motion a disguised successive § 2254 petition.

There is no indication that Petitioner received certification from the Ninth Circuit to file the Rule 60(b) motion in this Court. Without certification from the Ninth Circuit, this Court is without jurisdiction and will deny Petitioner's Rule 60(b) motion as an unauthorized, disguised, successive § 2254 petition. See *Washington, 653 F.3d at 1065*; *Allen v. Ornoski, 435 F.3d 946, 958 (9th Cir. 2006)*.

ORDER

Accordingly, IT IS HEREBY ORDERED that Petitioner Rule 60(b) (Doc. No. 27) is DENIED.

IT IS SO ORDERED.

Dated: September 10, 2015

/s/ Anthony W. Ishii

SENIOR DISTRICT JUDGE

Positive
As of: October 22, 2015 11:50 PM EDT

Ghafur v. Davis

United States District Court for the Eastern District of California

September 17, 2012, Decided; September 17, 2012, Filed

1:12-cv-01460-GSA (HC)

Reporter
2012 U.S. Dist. LEXIS 132604

KHADIJAH GHAFUR, Petitioner, vs. R. DAVIS, Respondent.

Subsequent History: Writ of habeas corpus dismissed, Certificate of appealability denied *Ghafur v. Davis, 2012 U.S. Dist. LEXIS 141886 (E.D. Cal., Oct. 1, 2012)*

Prior History: *Ghafur v. Eichenberger, 2011 U.S. Dist. LEXIS 12144 (E.D. Cal., Feb. 8, 2011)*

Core Terms

appointing counsel, interest of justice

Counsel: **[*1]** ***Khadijah Ghafur***, Petitioner, Pro se, CHOWCHILLA, CA.

Judges: Gary S. Austin, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Gary S. Austin

Opinion

ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL

(DOCUMENT #5)

Petitioner has requested the appointment of counsel. There currently exists no absolute right to appointment of counsel in habeas proceedings. See, e.g., *Anderson v. Heinze, 258 F.2d 479, 481 (9th Cir. 1958)*; *Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir. 1984)*. However, Title *18 U.S.C. § 3006A(a)(2)(B)* authorizes the appointment of counsel at any stage of the case if ″the interests of justice so require.″ See *Rule 8(c), Rules Governing Section 2254 Cases.* In the present case, the Court does not find that the interests of justice require the appointment of counsel at the present time. Accordingly, IT IS HEREBY ORDERED that Petitioner's request for appointment of counsel is denied.

IT IS SO ORDERED.

Dated: September 17, 2012

/s/ Gary S. Austin

UNITED STATES MAGISTRATE JUDGE

Positive
As of: October 22, 2015 11:50 PM EDT

Ghafur v. Davis

United States District Court for the Eastern District of California

October 1, 2012, Decided; October 1, 2012, Filed

1:12-CV-01460 GSA HC

Reporter
2012 U.S. Dist. LEXIS 141886; 2012 WL 4662702

KHADIJAH GHAFUR, Petitioner, v. R. DAVIS, Warden, Respondent.

Subsequent History: Habeas corpus proceeding at *Ghafur v. California, 2013 U.S. Dist. LEXIS 116583 (E.D. Cal., Aug. 16, 2013)*

Prior History: *Ghafur v. Davis, 2012 U.S. Dist. LEXIS 132604 (E.D. Cal., Sept. 17, 2012)*

Core Terms

successive petition, certificate, district court, habeas corpus

Counsel: **[*1]** ***Khadijah Ghafur***, Petitioner, Pro se, CHOWCHILLA, CA.

Judges: Gary S. Austin, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Gary S. Austin

Opinion

ORDER DISMISSING SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO *28 U.S.C. § 2244(b)*

ORDER DIRECTING CLERK OF COURT TO ENTER JUDGMENT AND CLOSE CASE

ORDER DECLINING ISSUANCE OF CERTIFICATE OF APPEALABILITY

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to *28 U.S.C. § 2254*. She has consented to the jurisdiction of the magistrate judge pursuant to *28 U.S.C. § 636(c)*.

In the petition filed on September 4, 2012, Petitioner challenges her 2006 conviction in Fresno County Superior Court for theft, embezzlement and fraud. A review of the Court's dockets and files shows Petitioner has already sought habeas relief with respect to these convictions in Ghafur v. Eichenberger, case no. 1:08-cv-01502 OWW JMD HC. In that case, the petition was denied and judgment was entered on March 31, 2011.

DISCUSSION

A federal court must dismiss a second or successive petition that raises the same grounds as a prior petition. *28 U.S.C. § 2244(b)(1)*. The court must also dismiss a second or successive petition raising a new ground unless the petitioner **[*2]** can show that 1) the claim rests on a new, retroactive, constitutional right or 2) the factual basis of the claim was not previously discoverable through due diligence, and these new facts establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. *28 U.S.C. § 2244(b)(2)(A)-(B)*. However, it is not the district court that decides whether a second or successive petition meets these requirements, which allow a petitioner to file a second or successive petition.

Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." In other words, Petitioner must obtain leave from the Ninth Circuit before she can file a second or successive petition in district court. See *Felker v. Turpin, 518 U.S. 651, 656-657, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996)*. This Court must dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave to file the petition because a district court lacks subject-matter **[*3]** jurisdiction over a second or successive petition. *Pratt v. United States, 129 F.3d 54, 57 (1st Cir. 1997)*; *Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997)*, *cert. denied*, *519 U.S. 1102, 117 S. Ct. 794, 136 L. Ed. 2d 735 (1997)*; *Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996)*.

Because the current petition was filed after April 24, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. *Lindh v. Murphy, 521 U.S. 320, 327, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997)*. Petitioner makes no showing that she has obtained prior leave from the Ninth Circuit to file her successive petition attacking the conviction. That being so, this Court has no jurisdiction to consider Petitioner's renewed application for relief from that conviction under *Section 2254* and must dismiss the petition. See *Greenawalt, 105 F.3d at 1277*; *Nunez, 96 F.3d at 991*. If Petitioner desires to proceed in bringing this petition for writ of habeas corpus, she must file for leave to do so with the Ninth Circuit. See *28 U.S.C. § 2244 (b)(3)*.

CERTIFICATE OF APPEALABILITY

A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal **[*4]** is only allowed in certain circumstances. *Miller-El v. Cockrell, 537 U.S. 322, 335-36, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*. The controlling statute in determining whether to issue a certificate of appealability is *28 U.S.C. § 2253*, which provides as follows:

> (a) In a habeas corpus proceeding or a proceeding under *section 2255* before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial **[*5]** showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

If a court denies a petitioner's petition, the court may only issue a certificate of appealability "if jurists of reason could disagree with the district court's resolution of h[er] 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*; *Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*. While the petitioner is not required to prove the merits of his case, she must demonstrate "something more than the absence of frivolity or the existence of mere good faith on h[er] . . . part." *Miller-El, 537 U.S. at 338*.

In the present case, the Court finds that reasonable jurists would not find the Court's determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. Petitioner has not made the required substantial showing of the denial of a constitutional right. Accordingly, the Court hereby DECLINES to issue a certificate **[*6]** of appealability.

ORDER

Accordingly, IT IS HEREBY ORDERED:

1) The petition for writ of habeas corpus is DISMISSED as successive;

2) The Clerk of Court is DIRECTED to enter judgment and close the case; and

3) The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: October 1, 2012

/s/ Gary S. Austin

UNITED STATES MAGISTRATE JUDGE

Positive
As of: October 22, 2015 11:50 PM EDT

Ghafur v. Eichenberger

United States District Court for the Eastern District of California

September 9, 2009, Decided; September 10, 2009, Filed

1:08-cv-01502-OWW-BAK-SMS HC

Reporter
2009 U.S. Dist. LEXIS 89606; 2009 WL 2957882

KHADIJAH GHAFUR, Petitioner, v. K. EICHENBERGER, Respondent.

Subsequent History: Magistrate's recommendation at *Ghafur v. Eichenberger, 2011 U.S. Dist. LEXIS 12144 (E.D. Cal., Feb. 8, 2011)*

Prior History: *People v. Ghafur (Khadijah A.), 2008 Cal. LEXIS 9449 (Cal., July 30, 2008)*

Core Terms

discovery, evidentiary hearing, habeas corpus, merits, documents

Counsel: **[*1]** ***Khadijah Ghafur***, Petitioner, Pro se, CHOWCHILLA, CA.

For K Eichenberger, Respondent: Kathleen Anne McKenna, LEAD ATTORNEY, California Dept. Justice, Office of the Attorney General, Fresno, CA.

Judges: Sandra M. Snyder, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Sandra M. Snyder

Opinion

ORDER DENYING PETITIONER'S MOTIONS FOR DISCOVERY AND EVIDENTIARY HEARING

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to *28 U.S.C. § 2254*.

On November 13, 2008, the Court ordered Respondent to file a response to the petition. (Doc. 10). On November 21, 2008, Petitioner filed the instant motion that requests an evidentiary hearing and also seeks discovery of unspecified documents. (Doc. 13). [1] On January 13, 2009, Respondent filed the answer. (Doc. 20). On February 17, 2009, Petitioner filed his traverse. (Doc. 23). The case is now fully briefed and awaiting a decision on the merits.

A. Motion for Discovery.

The writ of habeas corpus is not a proceeding in the original criminal prosecution but an independent civil suit." *Riddle v. Dyche, 262 U.S. 333, 335-336, 43 S.Ct. 555, 555, 67 L. Ed. 1009 (1923)*; *See, e.g. Keeney v. Tamayo-Reyes, 504 U.S. 1, 14, 112 S.Ct. 1715, 1722, 118 L. Ed. 2d 318 (1992)* (O'Connor, J., dissenting). However, modern habeas corpus procedure has the same function as an ordinary appeal. *Anderson v. Butler, 886 F.2d 111, 113 (5th Cir. 1989)*; *O'Neal v. McAninch, 513 U.S. 432, 442, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995)* (federal court's function in habeas corpus proceedings is to "review errors in state criminal trials" (emphasis omitted)). A habeas proceeding does not proceed to "trial" and unlike other civil litigation, a habeas corpus petitioner is not entitled to broad discovery. *Bracy v. Gramley, 520 U.S. 899, 117 S.Ct. 1793, 1796-97, 138 L. Ed. 2d 97 (1997)*; *Harris v. Nelson, 394 U.S. 286, 295, 89 S.Ct. 1082, 1088-89, 22 L. Ed. 2d 281 (1969)*. Although discovery is available pursuant to *Rule 6*, it is only granted at the Court's discretion, and upon a showing of good cause. *Bracy, 520 U.S. 899, 117 S.Ct. 1793, 1797, 138 L. Ed. 2d 97*; **[*3]** *McDaniel v. United States Dist. Court (Jones), 127 F.3d 886, 888 (9th Cir. 1997)*; *Jones v. Wood, 114 F.3d 1002, 1009 (9th Cir. 1997)*; *Rule 6(a) of the Rules Governing Section 2254*. The Advisory Committee Notes to *Rule 6 of the Rules Governing Section 2254 Cases* emphasize that

[1] The motion itself does not refer to any discovery request and is limited to requesting an evidentiary hearing. However, in a handwritten note appended to the motion, Petitioner refers to bankruptcy proceedings against an organization from which Petitioner apparently was found guilty of embezzling funds. **[*2]** Presumably, Petitioner wishes this Court to permit discovery of unspecified documents related to that organization's bankruptcy.

Rule 6 was not intended to extend to habeas corpus petitioners, as a matter of right, the Federal Rules of Civil Procedure's broad discovery provisions. Rule 6, Advisory Committee Notes (quoting Harris, 394 U.S. at 295, 89 S.Ct. at 1089).

Because Petitioner states no specific documents on which he would like discovery, the purpose of the instant motion and the proferred justification for permitting further discovery is unclear. If the purpose of the instant motions was to ensure this court apply constitutional standards to Petitioner's petition, this court assures Petitioner that it will review the claims in his petition under the provisions of the AEDPA. Van Tran v. Lindsey, 212 F.3d 1143, 1148 (9th Cir. 2000). Pursuant to the AEDPA, a state court's decision denying relief may be reversed only if that decision is ″contrary to, or involves an unreasonable application of, clearly established federal law as determined **[*4]** by the Supreme Court of the United States.″ Id., at 1149 (*quoting* 28 U.S.C. § 2254(d)(1)).

However, if the purpose of Petitioner's motion is to force additional discovery, the motions must be denied. Unlike other civil litigation, a habeas corpus petitioner is not entitled to broad discovery. Bracy, 520 U.S. at 904; Harris, 394 U.S. at 295. A petitioner does not have the right to inquire into all matters which are relevant to the subject matter involved in the pending action, whether admissible at trial or not. Harris, 394 U.S. at 297. ″Such a broad-ranging preliminary inquiry is neither necessary nor appropriate in the context of a habeas corpus proceeding.″ Id. Elaborate discovery procedures would cause substantial delay to prisoners and place a heavy burden upon courts, prison officials, prosecutors, and police. Id. Nevertheless, ″where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.″ Id. at 300.

In this case, Petitioner **[*5]** does not specify the documents for which he would like discovery and does not demonstrate good cause why the request for discovery should be granted. In his petition, Petitioner is challenging, inter alia, the sufficiency of the evidence supporting his conviction. (Doc. 1). In addressing whether the state court's judgment and sentence that is based upon such evidence was contrary to or an unreasonable application of clearly established federal law, the Court will carefully examine the state appellate record, including the trial transcript, lodged with the Court by Respondent. In determining whether Petitioner's conviction is supported by substantial evidence, the Court will look at the evidence presented by the prosecution; however, it would be wholly inappropriate for the Court to permit discovery of, and subsequently entertain legal arguments related to, documents not introduced into evidence at Petitioner's trial and considered by the jury in arriving at a guilty verdict. Thus, in the Court's view, further discovery of the type suggested by Petitioner in the instant motion would be unnecessary and result in undue delay. In his motion, Petitioner does not explain why the information **[*6]** is needed, nor what claims or arguments said discovery would relate to, nor why said discovery is relevant to a determination of the merits of this petition. Accordingly, the Court will deny the motion for discovery.

B. Motion for Evidentiary Hearing.

Rule 8(a) of the Rules Governing Section 2254 Cases provides that where a petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and transcripts and record of the state court proceedings are filed, shall, *upon review* of those proceedings, determine whether an evidentiary hearing is required. The purpose of an evidentiary hearing is to resolve the merits of a factual dispute. An evidentiary hearing on a claim is required where it is clear from the petition that: (1) the allegations, if established, would entitle the petitioner to relief; and (2) the state court trier of fact has not reliably found the relevant facts. See, Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir.1992). As the function of an evidentiary hearing is to try issues of fact, Townsend v. Sain 372 U.S. 293, 309, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963)(*overruled in part by* Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 118 L. Ed. 2d 318 (1993)), such a hearing is unnecessary when **[*7]** only issues of law are raised. Id.

As mentioned previously, the answer and traverse have already been filed and the case is now ripe for a decision on the merits. The Court, however, has not yet conducted such a review of the merits, and thus, whether or not there exists a factual dispute of the type that warrants an evidentiary hearing has not been made. Following a thorough review of the petition's merits, the Court will sua sponte issue an order for an evidentiary hearing *should it find one necessary.* Accordingly, Petitioner's Motion for an Evidentiary Hearing is DENIED.

ORDER

For the foregoing reasons, the Court HEREBY ORDERS as follows:

1. Petitioner's motion for evidentiary hearing and discovery (Doc. 13), is DENIED.

IT IS SO ORDERED.

UNITED STATES MAGISTRATE JUDGE

Dated: September 9, 2009

/s/ Sandra M. Snyder

Positive
As of: October 22, 2015 11:50 PM EDT

Ghafur v. Perkins

United States District Court for the Eastern District of California

January 16, 2014, Decided; January 16, 2014, Filed

Case No.: 1:13-cv-01282-AWI-JLT

Reporter
2014 U.S. Dist. LEXIS 5884; 2014 WL 202726

KHADIJAH GHAFUR, Petitioner, v. LARRY PERKINS, et al., Respondents.

Subsequent History: Adopted by, Motion granted by, Writ of habeas corpus dismissed, Certificate of appealability denied *Ghafur v. Perkins, 2014 U.S. Dist. LEXIS 184718 (E.D. Cal., Apr. 4, 2014)*

Prior History: *Ghafur v. California, 2013 U.S. Dist. LEXIS 116583 (E.D. Cal., Aug. 16, 2013)*

Core Terms

successive petition, motion to dismiss, district court, actual innocence, days

Counsel: **[*1]** ***Khadijah Ghafur***, Petitioner, Pro se, Fresno, CA.

For Larry Perkins, Probation Officer, Respondent: Brian George Smiley, LEAD ATTORNEY, Office Of The Attorney General, Department of Justice, Sacramento, CA.

Judges: Jennifer L. Thurston, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Jennifer L. Thurston

Opinion

FINDINGS AND RECOMMENDATIONS RE: RESPONDENT'S MOTION TO DISMISS

(Doc. 20)

ORDER DIRECTING OBJECTIONS TO BE FILED WITHIN TWENTY-ONE DAYS

Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas corpus pursuant to *28 U.S.C. § 2254*.

PROCEDURAL HISTORY

The instant petition was filed on July 18, 2013 in the United States District Court for the Central District of California.[1] (Doc. 1). On August 14, 2013, the case was transferred to this Court. (Doc. 6). On August 16, 2013, after a preliminary review of the petition revealed that the petition may be untimely and should therefore be dismissed, the Court issued an Order to Show Cause why the petition should not be dismissed as untimely. (Doc. 9). The Order to Show Cause gave Petitioner thirty days within which to respond. On September 11, 2013, Petitioner filed her response, contending actual innocence as an exception to the one-year **[*2]** limitation period and also contending that the evidence

[1] In Houston v. Lack, the United States Supreme Court held that a pro se habeas petitioner's notice of appeal is deemed filed on the date of its submission to prison authorities for mailing, as opposed to the actual date of its receipt by the court clerk. Houston v. Lack, 487 U.S. 266, 276, 108 S. Ct. 2379, 2385, 101 L. Ed. 2d 245 (1988). The rule is premised **[*3]** on the pro se prisoner's mailing of legal documents through the conduit of "prison authorities whom he cannot control and whose interests might be adverse to his." Miller v. Sumner, 921 F.2d 202, 203 (9th Cir. 1990); see Houston, 487 U.S. at 271. The Ninth Circuit has applied the "mailbox rule" to state and federal petitions in order to calculate the tolling provisions of the AEDPA. ***Saffold v. Newland, 250 F.3d 1262, 1268-1269 (9th Cir. 2000)***; Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003). The date the petition is signed may be considered the earliest possible date an inmate could submit his petition to prison authorities for filing under the mailbox rule. Jenkins v. Johnson, 330 F.3d 1146, 1149 n. 2 (9th Cir. 2003). Accordingly, for all of Petitioner's state petitions and for the instant federal petition, the Court will consider the date of signing of the petition (or the date of signing of the proof of service if no signature appears on the petition) as the earliest possible filing date and the operative date of filing under the mailbox rule for calculating the running of the statute of limitation. Petitioner signed the instant petition on July 18, 2013. (Doc. 1, pt. 1, **[*4]** p. 23).

establishing her actual innocence was discovered at a point that would have made the petition timely under 28 U.S.C. § 2244. (Doc. 13). Because Petitioner's response made reference to evidence not then before the Court, the Court could not make a final determination regarding timeliness until the state court record had been lodged with the Court for its review. Therefore, on September 12, 2013, the Court ordered Respondent to file an answer to the petition. (Doc. 14). On December 11, 2013, Respondent filed the instant motion to dismiss, contending that the petition is untimely and that it should be dismissed as a successive petition. (Doc. 20). On December 26, 2013, Petitioner filed her opposition to the motion to dismiss (Doc. 21), and on January 7, 2014, Respondent filed a reply. (Doc. 22).

DISCUSSION

A. Procedural Grounds for Motion to Dismiss

As mentioned, Respondent has filed a Motion to Dismiss the petition as being filed outside the one year limitations period prescribed by Title 28 U.S.C. § 2244(d)(1) and as successive. Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . . ." Rule 4 of the Rules Governing Section 2254 Cases.

The Ninth Circuit has allowed Respondent's to file a Motion to Dismiss in lieu of an Answer if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same). Thus, a Respondent can file a Motion to Dismiss after **[*5]** the court orders a response, and the Court should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

In this case, Respondent's Motion to Dismiss is based on a violation of 28 U.S.C. 2244(d)(1)'s one year limitation period and the statutory bar on successive petitions. Because Respondent's Motion to Dismiss is similar in procedural standing to a Motion to Dismiss for failure to exhaust state remedies or for state procedural default and Respondent has not yet filed a formal Answer, the Court will review Respondent's Motion to Dismiss pursuant to its authority under Rule 4.

B. Successive Petitions.

A federal court must dismiss a second or successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The Court must also dismiss a second or successive petition raising a *new ground* unless the petitioner can show that 1) the claim rests on a new, retroactive, constitutional right, or 2) the factual basis of the claim was not previously discoverable through due diligence, and these new facts establish by clear and convincing evidence that but for the constitutional error, no reasonable fact-finder would have found the applicant **[*6]** guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B).

However, it is not the district court that decides whether a second or successive petition meets these requirements that allow a petitioner to file a second or successive petition, but rather the Ninth Circuit. Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." In other words, Petitioner must obtain leave from the Ninth Circuit before she can file a second or successive petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996). This Court must dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave to file the petition because a district court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United States, 129 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997), *cert. denied*, 519 U.S. 1103, 117 S. Ct. 794, 136 L. Ed. 2d 735 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

Because the current petition **[*7]** was filed after April 24, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. Lindh v. Murphy, 521 U.S. 320, 327, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). Respondent's motion to dismiss points out that Petitioner has previously filed two separate federal habeas corpus actions in this Court attacking the same conviction that is the subject of the instant petition. (Doc. 20, pp. 3-4). Those actions are (1) case no. 1:08-cv-01502-OWW-JMD, and (2) case no. 1:12-cv-01460-GSA. The former was denied on its merits and the latter was dismissed as successive. Petitioner makes no showing that she has obtained leave from the Ninth Circuit to file this successive petition attacking her conviction. That being so, this Court has no jurisdiction to consider Petitioner's renewed application for relief from that conviction under § 2254 and must dismiss the petition.

See *Greenawalt, 105 F.3d at 1277*; *Nunez, 96 F.3d at 991*. If Petitioner desires to proceed in bringing this petition for writ of habeas corpus, she must first file for leave to do so with the Ninth Circuit. See *28 U.S.C. § 2244 (b)(3)*.

In her opposition to the motion to dismiss, Petitioner argues **[*8]** that she could not have presented some of the claims in the instant petition in earlier petitions because of ineffective assistance of former counsel and that, had such ″new″ evidence been presented earlier, it would have supported a claim of actual innocence. (Doc. 21, pp. 2-3). As Respondent correctly points out in the Reply, the language of *§ 2244(b)(2)* is quite explicit in prohibiting the district court from considering successive petitions raising new claims unless prior approval of the Ninth Circuit has been obtained. If Petitioner wishes to argue that ineffective assistance of former counsel prevented her from raising her claims in prior habeas proceedings and that sufficient evidence exists to satisfy the ″actual innocence″ standard, those are arguments she must bring to the Ninth Circuit, not this Court. In the absence of Ninth Circuit permission, this Court lacks jurisdiction to consider a successive petition. Accordingly, the petition must be dismissed for lack of jurisdiction.[2]

RECOMMENDATION

Accordingly, the Court HEREBY RECOMMENDS that the motion to dismiss (Doc. 20), be **GRANTED** and the habeas corpus petition be **DISMISSED** as a successive petition.

This Findings and Recommendation is submitted to the United States District Court Judge assigned to this case, pursuant to the provisions of *28 U.S.C. section 636 (b)(1)(B)* and *Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California*.

Within twenty-one (21) days after being served with a copy, any party may file written objections with the court and serve **[*10]** a copy on all parties. Such a document should be captioned ″Objections to Magistrate Judge's Findings and Recommendation.″ Replies to the objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to *28 U.S.C. § 636 (b)(1)(C)*. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991)*.

IT IS SO ORDERED.

Dated: **January 16, 2014**

/s/ Jennifer L. Thurston

UNITED STATES MAGISTRATE JUDGE

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[2] Because it is clear that the petition is successive and must be dismissed, the Court need not address Respondent's claim that the petition is untimely or Petitioner's response that she is actually **[*9]** innocent. In any event, the record is insufficient to make any determination on whether Petitioner's ″newly discovered″ evidence meets the actual innocence standard. Petitioner also makes her actual innocence claim in arguing that this Court should consider her successive petition. However, as mentioned above, this Court has no jurisdiction to consider any successive petition unless and until the Ninth Circuit grants her permission to proceed. Accordingly, Petitioner can raise actual innocence and any other contentions she believes justify a successive petition with the appropriate court, i.e., the Ninth Circuit.

Neutral
As of: October 22, 2015 11:50 PM EDT

Ghafur v. Perkins

United States District Court for the Eastern District of California

April 4, 2014, Decided; April 4, 2014, Filed

Case No.: 1:13-cv-01282-AWI-JLT

Reporter
2014 U.S. Dist. LEXIS 184718

KHADIJAH GHAFUR, Petitioner, v. LARRY PERKINS, Probation Officer, et al., Respondents.

Prior History: *Ghafur v. Perkins, 2014 U.S. Dist. LEXIS 5884 (E.D. Cal., Jan. 16, 2014)*

Core Terms

certificate, final order, DECLINES, denial of constitutional rights, motion to dismiss, issues, habeas corpus proceeding, writ of habeas corpus, court of appeals, district judge, state prisoner, habeas corpus, writ petition, encouragement, detention, jurists, parties

Counsel: **[*1]** ***Khadijah Ghafur***, Petitioner, Pro se, Fresno, CA.

For Larry Perkins, Probation Officer, Respondent: Brian George Smiley, LEAD ATTORNEY, Office Of The Attorney General, Department of Justice, Sacramento, CA.

Judges: Anthony W. Ishii, SENIOR DISTRICT JUDGE.

Opinion by: Anthony W. Ishii

Opinion

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS (Doc. 23)

ORDER GRANTING MOTION TO DISMISS (Doc. 20)

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS (Doc. 1)

ORDER DIRECTING CLERK OF COURT TO ENTER JUDGMENT AND CLOSE CASE

ORDER DECLINING TO ISSUE CERTIFICATE OF APPEALABILITY

Petitioner was a state prisoner proceeding in propria persona with a petition for writ of habeas corpus pursuant to *28 U.S.C. § 2254*. On December 11, 2013, Respondent filed a motion to dismiss the petition as untimely and successive. (Doc. 20). On January 16, 2014, the Magistrate Judge assigned to the case issued Findings and Recommendations to grant Respondent's motion to dismiss. (Doc. 23). This Findings and Recommendations was served upon all parties and contained notice that any objections were to be filed within twenty-one days from the date of service of that order. To date, none of the parties has filed objections.

In accordance with the provisions of *28 U.S.C. § 636 (b)(1)(C)*, this Court has conducted **[*2]** a *de novo* review of the case. Having carefully reviewed the entire file, the Court concludes that the Magistrate Judge's Findings and Recommendations is supported by the record and proper analysis.

Moreover, the Court declines to issue a certificate of appealability. A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal is only allowed in certain circumstances. *Miller-El v. Cockrell, 537 U.S. 322, 335-336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*. The controlling statute in determining whether to issue a certificate of appealability is *28 U.S.C. § 2253*, which provides as follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be **[*3]** taken to the court of appeals from—

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

If a court denied a petitioner's petition, the court may only issue a certificate of appealability when a petitioner makes a substantial showing of the denial of a constitutional right. *28 U.S.C. § 2253(c)(2)*. To make a substantial showing, the petitioner must establish that ″reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further'.″ *Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)* (*quoting Barefoot v. Estelle, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)*).

In the present case, the Court finds that Petitioner has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists would not **[*4]** find the Court's determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. Thus, the Court DECLINES to issue a certificate of appealability.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations, filed January 16, 2014 (Doc. 23), is ADOPTED IN FULL;
2. Respondent's Motion to Dismiss (Doc. 20), is GRANTED;
3. The petition for writ of habeas corpus (Doc. 1), is DISMISSED as successive;
4. The Clerk of Court is DIRECTED to ENTER JUDGMENT and close the file; and,
5. The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: April 4, 2014

/s/ Anthony W. Ishii

SENIOR DISTRICT JUDGE