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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN GHOLAR,)	1:10-CV-00036 AWI GSA HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATION
)	REGARDING DISMISSAL OF SUCCESSIVE
v.)	PETITION FOR WRIT OF HABEAS
)	CORPUS PURSUANT TO
JAMES YATES, Warden,)	28 U.S.C. § 2244(b)
)	
Respondent.)	

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

In the petition filed on January 7, 2010, Petitioner challenges his 2001 conviction in Kern County Superior Court for committing a lewd act on a child under the age of fourteen. A review of the Court’s dockets and files shows Petitioner has previously sought habeas relief with respect to this conviction.¹ In case no. 1:03-CV-5371 AWI DLB HC, the petition was denied on the merits. In case no. 1:08-CV-00569 OWW GSA HC, the petition was dismissed as successive.

¹The Court takes judicial notice of the dockets in case nos. 1:03-CV-5371 AWI DLB and 1:08-CV-00569 OWW GSA HC. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir.1993); 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.) (Judicial notice may be taken of court records).

1 **DISCUSSION**

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

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

20 Because the current petition was filed after April 24, 1996, the provisions of the
21 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current
22 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has
23 obtained prior leave from the Ninth Circuit to file his successive petition attacking the conviction.
24 That being so, this Court has no jurisdiction to consider Petitioner's renewed application for relief
25 from that conviction under Section 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at
26 1277; Nunez, 96 F.3d at 991. If Petitioner desires to proceed in bringing this petition for writ of
27 habeas corpus, he must file for leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244 (b)(3).

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RECOMMENDATION

Accordingly, IT IS HEREBY RECOMMENDED that the petition for writ of habeas corpus be DISMISSED as successive.

This Findings and Recommendation is submitted to the Honorable Anthony W. Ishii, United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 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, Petitioner 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 Recommendations.” The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is 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: March 8, 2010

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE