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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID GATHINGS,

Petitioner,

No. 2:08-cv-2469 MCE KJN P

vs.

IVAN D. CLAY, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner, a state prisoner proceeding without counsel, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with an application to proceed in forma pauperis.

Examination of the in forma pauperis application reveals that petitioner is unable to afford the costs of suit. Accordingly, the application to proceed in forma pauperis will be granted. See 28 U.S.C. § 1915(a).

Preliminary Screening

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, Rules Governing Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may

1 dismiss a petition for writ of habeas corpus at several stages of a case, including “summary
2 dismissal under Rule 4; a dismissal pursuant to a motion by the respondent; a dismissal after the
3 answer and petition are considered; or a dismissal after consideration of the pleadings and an
4 expanded record.”

5 Analysis

6 In his petition, petitioner challenges his January 12, 2001 conviction for voluntary
7 manslaughter with a use of weapon enhancement. Specifically, petitioner claims that the San
8 Joaquin County Superior Court improperly sentenced him in violation of the principles
9 announced in Cunningham v. California, 549 U.S. 270 (2007). (Pet. at 4.)

10 The court’s own records reveal that petitioner previously filed a petition for writ
11 of habeas corpus attacking this same conviction. See Case No. CIV S-04-2210 MCE KJN P.¹ In
12 that case, petitioner claimed that the trial court abused its discretion by imposing the upper term
13 for the gun enhancement. This court disagreed with petitioner’s contention. Accordingly, this
14 court recommended denying petitioner’s application for writ of habeas corpus on the merits.

15 “A claim presented in a second or successive habeas corpus application under
16 section 2254 that was not presented in a prior application shall be dismissed. . . .” 28 U.S.C.
17 § 2244(b)(2). This is the case unless,

18 (A) the applicant shows that the claim relies on a new
19 rule of constitutional law, made retroactive to cases on
20 collateral review by the Supreme Court, that was previously
unavailable; or

21 (B)(i) the factual predicate for the claim could not have
22 been discovered previously through the exercise of due
diligence; and

23 (ii) the facts underlying the claim, if proven and viewed
24 in light of the evidence as a whole, would be sufficient to
establish by clear and convincing evidence that, but for
constitutional error, no reasonable factfinder would have

25 ¹ A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman,
26 803 F.2d 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

1 found the applicant guilty of the underlying offense.

2 28 U.S.C. § 2244(b)(2). Before a second or successive petition permitted by statute can be filed
3 in the district court, “the applicant shall move in the appropriate court of appeals for an order
4 authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A).

5 Here, petitioner has not obtained an order from the Ninth Circuit Court of Appeals
6 authorizing the district court to consider his second or successive petition.² Petitioner cannot
7 proceed with his successive petition in this court unless and until he obtains such an order.³
8 Accordingly, petitioner’s unauthorized second or successive petition should be dismissed without
9 prejudice to its refileing with a copy of an order from the Ninth Circuit authorizing him to file a
10 second or successive petition.

11 CONCLUSION

12 For the reasons discussed above, IT IS HEREBY RECOMMENDED that:

13 1. Petitioner’s application for writ of habeas corpus be dismissed without
14 prejudice to its refileing with a copy of an order from the Ninth Circuit authorizing petitioner to
15 file a second or successive petition; and

16 2. This action be closed.


17 These findings and recommendations are submitted to the United States District
18 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-

19 ² Petitioner may present a successive petition under such circumstances governed by 28
20 U.S.C. § 2244(b)(2)(A), which allows a second or successive habeas petition if “the applicant
21 shows that the claim relies on a new rule of constitutional law, made retroactive to cases on
22 collateral review by the Supreme Court, that was previously unavailable.” Under 28 U.S.C.
23 § 2244(b)(3)(A), however, this determination is made by the United States Court of Appeals
upon a petitioner's motion for an order authorizing the district court to consider his second or
successive petition.

24 ³ Petitioner contends that decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000),
25 Blakely v. Washington, 542 U.S. 296 (2004) and Cunningham, 549 U.S. at 270, were not issued
26 until after he filed his original federal petition in 2004. (Pet. at 6.) However, whether petitioner
may raise this claim in a successive petition is still an issue for the Ninth Circuit to decide.
Petitioner is required to make his argument to the United States Court of Appeals in a motion for
an order authorizing the district court to consider his second or successive petition.

1 one days after being served with these findings and recommendations, petitioner may file written
2 objections with the court. The document should be captioned "Objections to Magistrate Judge's
3 Findings and Recommendations." Petitioner is advised that failure to file objections within the
4 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
5 F.2d 1153 (9th Cir. 1991).

6 DATED: August 9, 2010

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10 KENDALL J. NEWMAN
11 UNITED STATES MAGISTRATE JUDGE

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