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

DARREL MAURICE SMITH, Sr.,

Petitioner,

No. CIV S-10-2353 GGH P

vs.

JAMES D. HARTLEY, Warden,

ORDER &

Respondent.

FINDINGS AND RECOMMENDATIONS

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Introduction

Petitioner, a state prisoner proceeding pro se, has filed a petition pursuant to 28 U.S.C. § 2254. Petitioner was convicted after a bench trial in Sacramento County Superior Court in 1984 to second degree murder with use of a deadly weapon and sentenced to 17 years to life (15-to-life plus two years). Petition, p. 1. The basis for the petition is that state courts violated his constitutional rights by denying petitioner specific performance of his 1984 plea agreement. Petition, pp. 4-8. Petitioner notes that once the sentence he herein challenges is served, he must serve a four-year sentence he received in May 2008 in Kings County Superior Court. Id. at 9.

Pending before the court is respondent’s motion to dismiss the petition as successive, filed on December 28, 2010. Petitioner filed his opposition on January 10, 2011.

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1 Motion to Dismiss

2 Respondent observes that petitioner, in Case No. Civ-S-88-1263 EJG GGH,  
3 challenged the same 1984 conviction at issue herein, which petition was denied by order filed on  
4 August 14, 1990. Respondent’s Lodged Documents 2, 3 & 4. Petitioner also filed, in Case No.  
5 S- 90-1605 EJG PAN, another challenge to the 1984 conviction, dismissed by order, filed on July  
6 30, 1992. Respondent’s Lodged Docs. 5, 6 & 7. Petitioner filed a third challenge, Case No.  
7 CIV-S-05-1276 JKS EFB, which portion that challenged the 1984 conviction was dismissed  
8 without prejudice by order, filed on February 7, 2008.<sup>1</sup> Respondent’s Lodged Docs. 8, 9 & 10.  
9 That portion challenging a parole denial was ultimately denied by order filed on September 26,  
10 2008.

11 Opposition

12 In his opposition, petitioner contends that the instant petition “addresses the  
13 ongoing violation of his unfulfilled plea agreement that has yet to be fulfilled by the state after  
14 over twenty-five years of incarceration.” Opposition (Opp.), p. 1. To respondent’s claim that  
15 petitioner has filed some thirty-four pro se state post conviction collateral challenges to the  
16 instant judgment (MTD, p. 2), petitioner argues that respondent does not list these filings  
17 because, when this claim was made with reference to Case No. CIV-S-05-1276 JKS EFB, it was  
18 made clear that none of the filings were those of petitioner. Opp., pp. 1-2. Petitioner includes an  
19 unauthenticated list of cases (some showing more than one entry for the same case) intended to  
20 demonstrate that the name of the petitioners in those cases share only his first and last (but not  
21 middle) name. Opp., at 3. Respondent, who failed to file a reply, does not address this disparity,

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23 <sup>1</sup> In the Findings and Recommendations adopted by that Order, it was noted that  
24 petitioner had not obtained an order from the Court of Appeals authorizing the court to proceed  
25 on claims challenging the constitutionality of his conviction that had been challenged in Case No.  
26 Civ-S-88-1263 EJG GGH. See docket # 41 of Case No. CIV-S-05-1276 JKS EFB, pp. 1-2.  
Moreover, the district judge, in adopting the Findings and Recommendations, expressly observed  
that the petition in Case No. CIV-S-05-1276 JKS EFB, “to the extent it attacks that [1984]  
conviction, is clearly a second or successive petition,” dismissing that portion of the petition  
without prejudice. See Order at docket # 47 of Case No. CIV-S-05-1276 JKS, p. 2.

1 but it does not appear to be germane to the question at issue. That petitioner does not deny that  
2 he has filed at least three prior federal petitions that concern the same 1984 conviction, however,  
3 is relevant.

4 Discussion

5 Under Ninth Circuit Rule 22-3(a), “[i]f a second or successive petition or motion,  
6 or an application for leave to file such an application or motion, is mistakenly submitted to the  
7 district court, the district court shall refer it to the court of appeals.” This court cannot consider  
8 the successive petition without prior authorization by the Ninth Circuit. Under 28 U.S.C. §  
9 2244(b)(3)(A), leave must first be obtained from the court of appeals to file a second or  
10 successive petition before petitioner can proceed in district court. Felker v. Turpin, 518 U.S.  
11 651, 656-657, 116 S. Ct. 2333 (1996). This is a jurisdictional requisite. Burton v. Stewart, 549  
12 U.S. 147, 152, 127 S. Ct. 793 (2007); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001)  
13 (once district court has recognized a petition as second or successive pursuant to § 2244(b), it  
14 lacks jurisdiction to consider the merits).

15 Petitioner’s claim that his present challenge that the state courts have failed to  
16 enforce the terms of the 1984 plea agreement/conviction does not obviate the necessity that  
17 petitioner must receive prior authorization from the Ninth Circuit Court of Appeals before he can  
18 proceed in this court, and petitioner has been informed that challenges to the same conviction/  
19 sentence bear this requirement. Respondent’s Lodged Docs. 9,10 - - - Case No. CIV-S-05-1276  
20 JKS . The bottom line is that petitioner has once again “brought claims contesting the same  
21 custody imposed by the same judgment of a state court” without first having obtained the  
22 requisite authorization from the Court of Appeals. Burton v. Stewart, 549 U.S. at 153, 127 S. Ct.  
23 793. Therefore, this case must be dismissed. The dismissal will be without prejudice to  
24 petitioner’s obtaining such authorization from the Ninth Circuit.

25 Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court assign a  
26 district judge to this case.

1 IT IS RECOMMENDED that respondent's December 28, 2010 (docket # 11)  
2 motion for the petition to be dismissed as successive be granted and this case be dismissed  
3 without prejudice.

4 These findings and recommendations are submitted to the United States District  
5 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
6 days after being served with these findings and recommendations, any party may file written  
7 objections with the court and serve a copy on all parties. Such a document should be captioned  
8 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
9 shall be served and filed within fourteen days after service of the objections. The parties are  
10 advised that failure to file objections within the specified time may waive the right to appeal the  
11 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

12 DATED: 03/25/2011

/s/ Gregory G. Hollows

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14 GREGORY G. HOLLOWES  
15 UNITED STATES MAGISTRATE JUDGE

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