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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CHRISTOPHER SLOAT,
Petitioner,
v.
M. SMELOSKY, Warden,
Respondent.

) Case No. CV 09-0454-ODW (MLG)
)
) MEMORANDUM AND ORDER DISMISSING
) SUCCESSIVE PETITION FOR WRIT OF
) HABEAS CORPUS BY A PERSON IN
) STATE CUSTODY
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I. Factual and Procedural Background

Petitioner is a state prisoner currently incarcerated at the Centinela State Prison in Imperial, California. He filed this petition for writ of habeas corpus on January 21, 2009. Because this is Petitioner's second petition challenging the identical underlying state court conviction, this petition must be dismissed as successive under 28 U.S.C. § 2244(b)(3)(A).

The petition challenges a November 2006 judgment from the Los Angeles County Superior Court, in which Petitioner was sentenced to a term of 13 years following conviction of three counts of assault with

1 a deadly weapon (automobile). Cal. Penal Code §§ 245(a)(1). The
2 California Court of Appeal affirmed the conviction and sentence on
3 November 20, 2007. The California Supreme Court denied review on
4 January 23, 2008.

5 On February 29, 2008, Petitioner filed a petition for writ of
6 habeas corpus in this court, challenging the judgment of conviction.
7 *Sloat v. Almager*, Case No. CV 08-1420-ODW (MLG). In that petition, he
8 raised claims of ineffective assistance of counsel and violation of his
9 Fourteenth Amendment due process right to a fair trial. Noting that
10 Petitioner had failed to raise the ineffective assistance of counsel
11 claim in state court, this Court issued a Report and Recommendation on
12 March 6, 2008, recommending that the petition be dismissed for failure
13 to exhaust all claims. The Court vacated the Report and Recommendation
14 on March 20, 2008, after Plaintiff filed a first amended petition
15 withdrawing the unexhausted claim. On October 8, 2008, an order and
16 judgment was entered denying the petition on the merits. No appeal was
17 taken from this judgment.

18 The current petition reveals that in May 2008, while the previous
19 federal habeas corpus petition was pending, Petitioner filed a petition
20 for writ of habeas corpus in the California Supreme Court raising the
21 unexhausted ineffective assistance claim and an additional claim that
22 his conviction was based on perjured testimony. The California Supreme
23 Court denied that petition on October 16, 2008.

24 This petition followed. In this petition, Sloat again challenges
25 the state court judgment entered in November 2006, this time raising
26 the claims recently rejected by the California Supreme Court. For the
27 reasons set forth below, the petition is ordered dismissed without
28 prejudice to Petitioner's right to apply for leave to file a successive

1 petition with the United States Court of Appeals for the Ninth Circuit.

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3 **II. Discussion.**

4 Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in
5 the United States District Court, a district court may summarily
6 dismiss a habeas petition, *before the respondent files an answer*, "[i]f
7 it plainly appears from the face of the petition ... that the
8 petitioner is not entitled to relief." The notes to Rule 4 state: "a
9 dismissal may be called for on procedural grounds, which may avoid
10 burdening the respondent with the necessity of filing an answer on the
11 substantive merits of the petition." See *Boyd v. Thompson*, 147 F.3d
12 1124, 1127-28 (9th Cir. 1998). It is beyond question that this Court
13 lacks jurisdiction to review this petition without authorization from
14 the court of appeals. Accordingly, summary dismissal of this petition
15 is warranted.

16 The present petition is governed by the provisions of the
17 Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132,
18 110 Stat. 1214) ("AEDPA"), enacted on April 24, 1996. Among other
19 things, AEDPA amended 28 U.S.C. § 2244 to require that "[b]efore a
20 second or successive application [for writ of habeas corpus] permitted
21 by this section is filed in the district court, the applicant shall
22 move in the appropriate court of appeals for an order authorizing the
23 district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).
24 Section 2244(b)(3)(A) explicitly provides that a *second and/or*
25 *successive* petition, like the one in this case, requires Ninth Circuit
26 approval before it can be considered by the district court. *Burton v.*
27 *Stewart*, 549 U.S. 147, 127 S.Ct. 793, 796 (2007). This Court must
28 dismiss any second or successive petition unless the court of appeals

1 has given Petitioner leave to file the petition because a district
2 court lacks subject-matter jurisdiction over a second or successive
3 petition. *Pratt v. United States*, 129 F.3d 54, 57 (1st Cir. 1997);
4 *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir. 1997), cert.
5 denied, 519 U.S. 1102 (1997); *Nunez v. United States*, 96 F.3d 990, 991
6 (7th Cir. 1996).

7 A claim in a second or successive habeas petition which was not
8 previously presented may be considered if the petitioner shows that the
9 claim relies upon a new rule of constitutional law, made retroactive to
10 cases on collateral review by the Supreme Court, that was previously
11 unavailable. 28 U.S.C. § 2244(b)(2)(A). However, a petitioner is still
12 required to seek authorization from the court of appeals in order to
13 have the district court consider the petition. 28 U.S.C. §
14 2244(b)(3)(A), see also *Reyes v. Te Vaughn*, 276 F.Supp.2d 1027, 1030
15 (C.D.Cal. 2003) (“[T]o the extent that petitioner would like to show
16 that he falls within one of the exceptions to dismissal of successive
17 habeas petitions, 28 U.S.C. § 2244(b)(2)(B), he must first present any
18 such claim to the Court of Appeals rather than to this Court.”)¹

19 This petition was filed without leave of the Ninth Circuit. Until
20 the Ninth Circuit authorizes the filing of this petition, this Court
21 lacks jurisdiction to consider the merits. See *Burton*, 127 S.Ct. at
22 799; *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001); *Nunez v.*
23 *United States*, 96 F.3d 990, 991 (7th Cir. 1996)(district court lacks
24 subject matter jurisdiction to consider second or successive petition).
25 Thus, dismissal of the petition without prejudice is required.

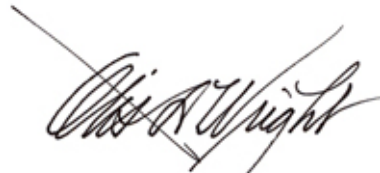
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28 ¹ Moreover, Petitioner has not shown that the Supreme Court has held *Cunningham* to be retroactive on collateral review.

1 **III. Order.**

2 In accordance with the foregoing, IT IS HEREBY ORDERED that the
3 petition is DISMISSED without prejudice to petitioner's applying to the
4 United States Court of Appeals for the Ninth Circuit for leave to file
5 a second or successive petition.

6 IT IS FURTHER ORDERED that the clerk shall serve a copy of this
7 order on Petitioner and the Attorney General for the State of
8 California.

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10 Dated: _January 28, 2009

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Otis D. Wright, II
United States District Judge

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16 Presented by:

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Marc L. Goldman
19 United States Magistrate Judge