

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

RUDY HARRIS,

CV F 06-0466 AWI DLB HC

Petitioner,

FINDINGS AND RECOMMENDATIONS  
REGARDING PETITION FOR WRIT OF  
HABEAS CORPUS

v.

[Doc. 1]

JAMES YATES, Warden,

Respondent.

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

Petitioner filed the instant petition for writ of habeas corpus on April 20, 2006. Petitioner is challenging his 1997 conviction of petty theft with a prior in violation of California Penal Code sections 490 and 666, and presenting false information to a police officer in violation of California Penal Code section 148.9. A review of this Court's docket system, indicates that Petitioner has previously filed a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in Rudy Harris v. Gail Lewis, CV-F-99-6700 OWW LJO HC, which challenged the same conviction which occurred in 1997. That petition was denied on the merits, with prejudice. (Court Docs. 21, 26, 53, 56, 58.)

**DISCUSSION**

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

1 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). A federal court must dismiss a second or  
2 successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The  
3 court must also dismiss a second or successive petition raising a new ground unless the petitioner  
4 can show that 1) the claim rests on a new, retroactive, constitutional right or 2) the factual basis  
5 of the claim was not previously discoverable through due diligence, and these new facts establish  
6 by clear and convincing evidence that but for the constitutional error, no reasonable factfinder  
7 would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B).  
8 However, it is not the district court that decides whether a second or successive petition meets  
9 these requirements, which allow a petitioner to file a second or successive petition.

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

20 A second or successive petition for habeas corpus is not considered "successive" if the  
21 initial habeas petition was dismissed for a technical or procedural reason versus on the merits.  
22 See Slack v. McDaniel, 529 U.S. 473, 485-87 (2000) (holding that a second habeas petition is not  
23 successive if the initial habeas petition was dismissed for failure to exhaust); Stewart v.  
24 Martinez-Villareal, 523 U.S. 637, 643-45 (1998) (a second habeas petition is not successive if the  
25 claim raised in the first petition was dismissed by the district court as premature.)

26 Because the prior petition in CV-F-99-6700, was denied on the merits, it therefore bars  
27 further litigation challenging that same conviction, absent permission to file a second or  
28 successive petition. Petitioner makes no showing that he has obtained prior leave from the Ninth

1 Circuit to file his successive petition attacking the conviction. That being so, this Court has no  
2 jurisdiction to consider Petitioner's renewed application for relief from that conviction under  
3 Section 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d  
4 at 991. If Petitioner desires to proceed in bringing this petition for writ of habeas corpus, he must  
5 file for leave to do so with the Ninth Circuit Court of Appeals. See 28 U.S.C. § 2244 (b)(3).

6 **RECOMMENDATION**

7 Accordingly, IT IS HEREBY RECOMMENDED that the petition for writ of habeas  
8 corpus be DISMISSED, without prejudice, as a successive petition.

9 These Findings and Recommendations are submitted to the assigned United States  
10 District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-  
11 304 of the Local Rules of Practice for the United States District Court, Eastern District of  
12 California. Within thirty (30) days after being served with a copy, any party may file written  
13 objections with the court and serve a copy on all parties. Such a document should be captioned  
14 "Objections to Magistrate Judge's Findings and Recommendations." Replies to the objections  
15 shall be served and filed within ten (10) court days (plus three days if served by mail) after  
16 service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to  
17 28 U.S.C. § 636 (b)(1)©. The parties are advised that failure to file objections within the  
18 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951  
19 F.2d 1153 (9th Cir. 1991).

20  
21 IT IS SO ORDERED.

22 **Dated: April 28, 2006**  
3b142a

**/s/ Dennis L. Beck**  
UNITED STATES MAGISTRATE JUDGE