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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL MALONE,  
Petitioner,  
v.  
MATTHEW KRAMER,  
Respondents.

No. 1:07-cv-00743-AWI-SMS (HC)  
ORDER DISMISSING MOTION TO  
VACATE, SET ASIDE, OR CORRECT  
SENTENCE (Doc. #33)  
ORDER DENYING MOTION TO APPOINT  
COUNSEL (Doc. #34)  
ORDER DENYING MOTION FOR  
EXTENSION (Doc. #35)

On July 19, 2010, the undersigned issued an order denying the petition for writ of habeas corpus on the merits. Petitioner appealed to the Ninth Circuit and on October 13, 2011, the judgment was affirmed.

On July 25, 2016, Petitioner filed three motions in this closed case: 1) A motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence; 2) A motion for appointment of counsel; and 3) A motion for extension of time with respect to the § 2255 motion. Petitioner’s various motions will be denied.

28 U.S.C. § 2255 applies to post-conviction challenges to a *federal* prisoner’s conviction or sentence. See 28 U.S.C. § 2255; Nettles v. Grounds, 830 F.3d 922, 931 n.6 (9th Cir. 2016) (en banc); Woods v. Carey, 525 F.3d 886, 889 n.2 (9th Cir. 2008). 28 U.S.C. § 2254 applies to post-conviction challenges by a *state* prisoner challenging his conviction or sentence. See 28 U.S.C. §

1 2254; Woods, 525 F.3d at 889 n.2; Stone v. Cardwell, 620 F.2d 212, 213 (9th Cir. 1980). Since  
2 Petitioner is a state prisoner, he must seek relief pursuant to § 2254. See id. Therefore, despite  
3 invocation of § 2255, the Court will view Petitioner's motion as brought under § 2254.

4 So viewing the petitioner, as noted above, a prior § 2254 petition by Petitioner was denied  
5 on July 19, 2010. Petitioner acknowledges this fact by stating that he pursuing a second or  
6 successive action. (Doc. No. 35 at p. 1.)

7 A federal court must dismiss a second or successive petition that raises the same grounds  
8 as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive  
9 petition raising a new ground unless the petitioner can show that (1) the claim rests on a new,  
10 retroactive, constitutional right, or (2) the factual basis of the claim was not previously  
11 discoverable through due diligence, and these new facts establish by clear and convincing  
12 evidence that but for the constitutional error, no reasonable factfinder would have found the  
13 applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the  
14 district court that decides whether a second or successive petition meets these requirements. 28  
15 U.S.C. § 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this  
16 section is filed in the district court, the applicant shall move in the appropriate court of appeals for  
17 an order authorizing the district court to consider the application." In other words, Petitioner  
18 must obtain leave from the Ninth Circuit before he can file a second or successive petition in  
19 district court. See Burton v. Stewart, 549 U.S. 147, 152-53 (2007). This Court must dismiss any  
20 second or successive petition unless the Court of Appeals has given Petitioner leave to file the  
21 petition because a district court lacks subject-matter jurisdiction over a second or successive  
22 petition. Burton, 549 U.S. at 152; United States v. Washington, 653 F.3d 1057, 1062-65 (9th Cir.  
23 2011); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001).

24 Here, Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit  
25 to file this successive petition attacking the conviction. Thus, this Court has no jurisdiction to  
26 consider Petitioner's renewed application for relief from that conviction under § 2254. See  
27 Burton, 549 U.S. at 152; Washington, 653 F.3d at 1062-65; Cooper, 274 F.3d at 1274. Therefore,  
28 the petition must be denied.



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