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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THOMAS SCHUSTER,)	1:09-cv-00555 AWI YNP (DLB) (HC)
)	
Petitioner,)	FINDINGS AND RECOMMENDATION
)	THAT PETITION FOR WRIT OF HABEAS
v.)	CORPUS BE DISMISSED AS A SECOND
)	OR SUCCESSIVE PETITION.
)	
KEN CLARK, 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 with the United States District Court for the Central District of California on March 13, 2009, claiming “denial of due process and liberty interest in parole.” (Pet. at 5). The case was transferred to this Court on March 26, 2009. (Doc. #4). Petitioner had previously filed a petition for writ of habeas corpus in this Court, case number 1:07-cv-00903-AWI-JMD, which is still pending. (Pet. at 8).

DISCUSSION

A federal court must dismiss a second or successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive petition raising a new ground unless the petitioner can show that 1) the claim rests on a new, retroactive, constitutional right or 2) the factual basis of the claim was not previously discoverable through due diligence, and these new facts establish by clear and convincing evidence that but for the

1 constitutional error, no reasonable finder of fact would have found the applicant guilty of the
2 underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court that decides
3 whether a second or successive petition meets these requirements, which allow a petitioner to file a
4 second or successive petition.

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

14 Because the current petition was filed after April 24, 1996, the provisions of the Antiterrorism
15 and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. Lindh v.
16 Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has obtained prior leave
17 from the Ninth Circuit to file his successive petition attacking the conviction. That being so, this
18 Court has no jurisdiction to consider Petitioner's renewed application for relief from that conviction
19 under Section 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96
20 F.3d at 991. If Petitioner desires to proceed in bringing this petition for writ of habeas corpus, he
21 must file for leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244 (b)(3).

22 RECOMMENDATION

23 Accordingly, IT IS HEREBY RECOMMENDED that the petition for writ of habeas corpus
24 be DISMISSED as successive.

25 This Findings and Recommendation is submitted to the Honorable Anthony W. Ishii, United
26 States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304
27 of the Local Rules of Practice for the United States District Court, Eastern District of California.
28 Within thirty (30) days (plus three days for mailing) after being served with a copy, any party may file

1 written objections with the court and serve a copy on all parties. Such a document should be
2 captioned "Objections to Magistrate Judge's Findings and Recommendations." The Court will then
3 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised
4 that failure to file objections within the specified time may waive the right to appeal the District
5 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6
7 IT IS SO ORDERED.

8 **Dated: November 12, 2009**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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