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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

STEVEN A. GARCIA,

1:09-cv-01828-AWI-DLB (HC)

Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

v.

[Doc. 1]

D. ADAMS, 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.

In the instant petition, Petitioner challenges the validity of his 2000 conviction and his sentence claiming the trial court violated the United States Supreme Court decision in Cunningham v. California, 549 U.S. 270 (2007) in imposing an upper term sentence and consecutive terms.

A review of the Court’s dockets and files shows Petitioner has previously sought habeas corpus relief with respect to this conviction. In case number 1:05-cv-00122 OWW YNP (HC), Petitioner raised several claims for relief with respect to his 2000 conviction.¹ On September 10, 2007, the petition was denied on the merits and judgment was entered. The United States Court of Appeals for the Ninth Circuit denied issuance of a certificate of appealability.

¹ The Court takes judicial notice of the docket in case number 1:05-cv-00122-OWW-YNP (HC). Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993).

1 DISCUSSION

2 Because the current petition was filed after April 24, 1996, the provisions of the
3 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current
4 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). A federal court must dismiss a second or
5 successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The
6 court must also dismiss a second or successive petition raising a new ground unless the petitioner
7 can show that 1) the claim rests on a new, retroactive, constitutional right or 2) the factual basis
8 of the claim was not previously discoverable through due diligence, and these new facts establish
9 by clear and convincing evidence that but for the constitutional error, no reasonable factfinder
10 would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B).
11 However, it is not the district court that decides whether a second or successive petition meets
12 these requirements, which allow a petitioner to file a second or successive petition.

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

23 Accordingly, because the prior petition was adjudicated "on the merits", the instant
24 petition is a "second or successive petition" under § 2244(b) which must be dismissed, without
25 prejudice, to re-filing if Petitioner seeks and obtains approval in the Ninth Circuit Court of
26 Appeals to file a second or successive petition.

27 RECOMMENDATION

28 Based on the foregoing, it is HEREBY RECOMMENDED that:

