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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

| | |
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| STEVEN L. SCHMIDT, |) 1:10-cv-00341-SKO-HC |
| |) |
| Petitioner, |) ORDER GRANTING RESPONDENT'S |
| |) MOTION TO DISMISS THE PETITION |
| |) (DOCS. 10, 1) |
| v. |) |
| |) ORDER DISMISSING THE PETITION AS |
| M. EVANS, Warden, |) SUCCESSIVE PURSUANT TO 28 U.S.C. |
| |) § 2244(b) (Doc. 1), |
| Respondent. |) DISMISSING PETITIONER'S MOTION |
| |) FOR EVIDENTIARY HEARING AS MOOT |
| _____ |) (Doc. 16), |
| | AND DECLINING TO ISSUE A |
| | CERTIFICATE OF APPEALABILITY |
| | ORDER DIRECTING THE CLERK TO |
| | CLOSE THE ACTION |

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 636(c)(1), the parties have consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting consent in signed writings filed by Petitioner on March 8, 2010 (doc. 3), and on behalf of Respondent on December 10, 2010 (doc. 9). Pending before the Court is Respondent's motion to dismiss the petition, which was filed on January 24, 2011. Petitioner filed an opposition to the motion

1 on February 11, 2011. Respondent filed a reply on February 18,
2 2011.

3 I. Proceeding by a Motion to Dismiss

4 A federal court is a court of limited jurisdiction which has
5 a continuing duty to determine its own subject matter
6 jurisdiction and to dismiss an action where it appears that the
7 Court lacks jurisdiction. Fed. R. Civ. P. 12(h)(3); CSIBI v.
8 Fustos, 670 F.2d 134, 136 n.3 (9th Cir. 1982) (citing City of
9 Kenosha v. Bruno, 412 U.S. 507, 511-512 (1973)); Billingsley v.
10 C.I.R., 868 F.2d 1081, 1085 (9th Cir. 1989).

11 Respondent has filed a motion to dismiss the petition on the
12 ground that this Court lacks subject matter jurisdiction over the
13 petition because it is successive and thus is barred by 28 U.S.C.
14 § 2244.

15 Rule 4 of the Rules Governing Section 2254 Cases in the
16 District Courts (Habeas Rules) allows a district court to dismiss
17 a petition if it "plainly appears from the face of the petition
18 and any exhibits annexed to it that the petitioner is not
19 entitled to relief in the district court...."

20 The Ninth Circuit has allowed respondents to file motions to
21 dismiss pursuant to Rule 4 instead of answers if the motion to
22 dismiss attacks the pleadings by claiming that the petitioner has
23 failed to exhaust state remedies or has violated the state's
24 procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418,
25 420 (9th Cir. 1990) (using Rule 4 to evaluate a motion to dismiss
26 a petition for failure to exhaust state remedies); White v.
27 Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 to
28 review a motion to dismiss for state procedural default); Hillery

1 v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D.Cal. 1982) (same).

2 Thus, a respondent may file a motion to dismiss after the Court
3 orders the respondent to respond, and the Court should use Rule 4
4 standards to review a motion to dismiss filed before a formal
5 answer. See, Hillery, 533 F. Supp. at 1194 & n.12.

6 Here, Respondent's motion to dismiss is based on lack of
7 subject matter jurisdiction. Respondent's motion is similar in
8 procedural posture to a motion to dismiss for failure to exhaust
9 state remedies or for state procedural default. Further,
10 although the motion is opposed, the motion does not raise
11 material factual disputes. Finally, Respondent has not yet filed
12 a formal answer.

13 The Court therefore exercises its discretion to review
14 Respondent's motion to dismiss pursuant to its authority under
15 Rule 4.

16 II. Background

17 Petitioner alleges that he is serving a sentence of fifty-
18 five (55) years to life imposed by the Stanislaus County Superior
19 Court upon Petitioner's conviction on August 20, 1999, of
20 attempted burglary with enhancements for prior convictions.

21 (Pet. 1.) Petitioner challenges his sentence on the ground that
22 it was unauthorized, illegal, and violated Petitioner's right to
23 due process of law under the Fourteenth Amendment. He further
24 argues that judicial error violated the protection against double
25 jeopardy and his rights under the Equal Protection Clause, and
26 the ineffective assistance of his trial and appellate counsel
27 violated Petitioner's Fifth and Fourteenth Amendment rights.

28 (Pet. 5-6.)

1 The Court may take judicial notice of court records. Fed.
2 R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333
3 (9th Cir. 1993); Valerio v. Boise Cascade Corp., 80 F.R.D. 626,
4 635 n. 1 (N.D. Cal. 1978), aff'd, 645 F.2d 699 (9th Cir. 1981).
5 The Court will take judicial notice of its own dockets and notes
6 that the present petition is not the first petition filed with
7 respect to the judgment pursuant to which Petitioner is detained.

8 On March 24, 2006, a habeas petition challenging
9 Petitioner's Stanislaus County conviction and sentence was denied
10 on the merits by this Court in Schmidt v. Scribner, 03-cv-6124-
11 AWI-DLB-HC. (Docs. 22, 24) The Court denied the petition on the
12 merits and entered judgment for the Respondent. (Docs. 22, 24;
13 24, 2; 25.)

14 III. Successive Petition

15 Because the petition was filed after April 24, 1996, the
16 effective date of the Antiterrorism and Effective Death Penalty
17 Act of 1996 (AEDPA), the AEDPA applies in this proceeding. Lindh
18 v. Murphy, 521 U.S. 320, 327 (1997), cert. denied, 522 U.S. 1008
19 (1997); Furman v. Wood, 190 F.3d 1002, 1004 (9th Cir. 1999).

20 Under the AEDPA, a federal court must dismiss a second or
21 successive petition that raises the same grounds as a prior
22 petition. 28 U.S.C. § 2244(b)(1). The Court must also dismiss a
23 second or successive petition raising a new ground unless the
24 petitioner can show that 1) the claim rests on a new,
25 retroactive, constitutional right or 2) the factual basis of the
26 claim was not previously discoverable through due diligence, and
27 the new facts establish by clear and convincing evidence that but
28 for the constitutional error, no reasonable factfinder would have

1 found the applicant guilty of the underlying offense. 28 U.S.C.
2 § 2244(b)(2)(A)-(B).

3 However, it is not the district court that decides whether a
4 second or successive petition meets these requirements, which
5 allow a petitioner to file a second or successive petition.
6 Section 2244(b)(3)(A) provides, "Before a second or successive
7 application permitted by this section is filed in the district
8 court, the applicant shall move in the appropriate court of
9 appeals for an order authorizing the district court to consider
10 the application." In other words, a petitioner must obtain leave
11 from the Ninth Circuit before he or she can file a second or
12 successive petition in district court. See Felker v. Turpin, 518
13 U.S. 651, 656-657 (1996). This Court must dismiss any claim
14 presented in a second or successive habeas corpus application
15 under section 2254 that was presented in a prior application
16 unless the Court of Appeals has given Petitioner leave to file
17 the petition. 28 U.S.C. § 2244(b)(1). This limitation has been
18 characterized as jurisdictional. Burton v. Stewart, 549 U.S.
19 147, 152 (2007); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th
20 Cir. 2001).

21 A disposition is "on the merits" if the district court
22 either considered and rejected the claim, or determined that the
23 underlying claim would not be considered by a federal court.
24 McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009) (citing
25 Howard v. Lewis, 905 F.2d 1318, 1322 (9th Cir. 1990)).

26 Here, the first petition concerning the Stanislaus County
27 judgment was denied on the merits. Petitioner makes no showing
28 that he has obtained prior leave from the Ninth Circuit to file

1 his successive petition attacking the conviction. Accordingly,
2 this court has no jurisdiction to consider Petitioner's renewed
3 application for relief from that conviction under section 2254
4 and must dismiss the petition. See, Felker v. Turpin, 518 U.S.
5 651, 656-57; Burton v. Stewart, 549 U.S. 147, 152; Cooper v.
6 Calderon, 274 F.3d 1270, 1274. If Petitioner desires to proceed
7 in bringing this petition for writ of habeas corpus, he must file
8 for leave to do so with the Ninth Circuit. See 28 U.S.C.
9 § 2244(b) (3).

10 Petitioner's reliance on Hill v. State of Alaska, 297 F.3d
11 895 (9th Cir. 2002) does not aid him. In Hill, the petitioner
12 sought permission from the Court of Appeals to file a successive
13 petition to raise a claim concerning the calculation of a
14 mandatory parole release date that could not have been included
15 in earlier petitions challenging the same conviction and
16 sentence. Because the parole claim could not have been included
17 in the earlier petitions, the court permitted the parole claim to
18 proceed. However, it declined to grant permission to raise a
19 claim challenging the underlying conviction. Hill, 297 F.3d at
20 897-99.

21 Here, Petitioner challenges the same judgment that was the
22 subject of his earlier petitions. Petitioner could have raised
23 the present challenges in an earlier petition. The Court
24 concludes that the petition must be dismissed as successive.

25 Because the limitations of § 2244 are jurisdictional, the
26 Court will not address Respondent's additional argument that the
27 petition should be dismissed because it was untimely. Further,
28 in light of the absence of subject matter jurisdiction in this

1 Court, Petitioner's motion for an evidentiary hearing filed on
2 March 3, 2011, will be dismissed as moot.

3 V. Certificate of Appealability

4 Unless a circuit justice or judge issues a certificate of
5 appealability, an appeal may not be taken to the Court of Appeals
6 from the final order in a habeas proceeding in which the
7 detention complained of arises out of process issued by a state
8 court. 28 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537
9 U.S. 322, 336 (2003). A certificate of appealability may issue
10 only if the applicant makes a substantial showing of the denial
11 of a constitutional right. 28 U.S.C. § 2253(c)(2). Under this
12 standard, a petitioner must show that reasonable jurists could
13 debate whether the petition should have been resolved in a
14 different manner or that the issues presented were adequate to
15 deserve encouragement to proceed further. Miller-El v. Cockrell,
16 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S. 473, 484
17 (2000)). A certificate should issue if the Petitioner shows that
18 jurists of reason would find it debatable whether the petition
19 states a valid claim of the denial of a constitutional right and
20 that jurists of reason would find it debatable whether the
21 district court was correct in any procedural ruling. Slack v.
22 McDaniel, 529 U.S. 473, 483-84 (2000).

23 In determining this issue, a court conducts an overview of
24 the claims in the habeas petition, generally assesses their
25 merits, and determines whether the resolution was wrong or
26 debatable among jurists of reason. Miller-El v. Cockrell, 537
27 U.S. at 336-37. It is necessary for an applicant to show more
28 than an absence of frivolity or the existence of mere good faith;

1 however, it is not necessary for an applicant to show that the
2 appeal will succeed. Id. at 338.

3 A district court must issue or deny a certificate of
4 appealability when it enters a final order adverse to the
5 applicant. Rule 11(a) of the Rules Governing Section 2254 Cases.

6 Here, Petitioner has not demonstrated that jurists of reason
7 would find it debatable whether or not the petition states a
8 valid claim of the denial of a constitutional right. Petitioner
9 has not made the substantial showing required for issuance of a
10 certificate of appealability.

11 Therefore, the Court will decline to issue a certificate of
12 appealability.

13 VI. Disposition

14 Accordingly, it is ORDERED that:

15 1) The petition for writ of habeas corpus is DISMISSED as
16 successive; and

17 2) Petitioner's motion for an evidentiary hearing is
18 DISMISSED as moot; and

19 3) The Court DECLINES to issue a certificate of
20 appealability; and

21 4) The Clerk is DIRECTED to close this action.
22

23 IT IS SO ORDERED.

24 **Dated: June 13, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE