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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOWELL FINLEY,)	1:10-CV-00868 GSA HC
)	
Petitioner,)	ORDER DISMISSING SUCCESSIVE
)	PETITION FOR WRIT OF HABEAS
v.)	CORPUS PURSUANT TO
)	28 U.S.C. § 2244(b)
)	
DOMINGO URIBE, JR., Warden,)	ORDER DIRECTING CLERK OF COURT
)	TO ENTER JUDGMENT AND CLOSE CASE
Respondent.)	ORDER DECLINING ISSUANCE OF
)	CERTIFICATE OF APPEALABILITY

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has returned a consent option form indicating consent to the jurisdiction of the Magistrate Judge pursuant to 28 U.S.C. § 636(c).

In the instant petition filed on May 17, 2010, Petitioner challenges his 1998 convictions in Kern County Superior Court. A review of the Court’s dockets and files shows Petitioner has previously sought habeas relief with respect to this conviction.¹ In case no. 1:00-CV-5521 DLB P, the petition was denied on the merits.

¹The Court takes judicial notice of the docket in case no. 1:00-CV-5521 DLB P. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir.1993); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n.1 (N.D.Cal.1978), aff’d, 645 F.2d 699, (9th Cir.) (Judicial notice may be taken of court records).

1 **DISCUSSION**

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

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

20 Because the current petition was filed after April 24, 1996, the provisions of the
21 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current
22 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has
23 obtained prior leave from the Ninth Circuit to file his successive petition attacking the conviction.
24 That being so, this Court has no jurisdiction to consider Petitioner's renewed application for relief
25 from that conviction under Section 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at
26 1277; Nunez, 96 F.3d at 991. If Petitioner desires to proceed in bringing this petition for writ of
27 habeas corpus, he must file for leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244 (b)(3).

28

1 **CERTIFICATE OF APPEALABILITY**

2 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
3 district court’s denial of his petition, and an appeal is only allowed in certain circumstances. Miller-
4 El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining whether to issue
5 a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

6 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
7 district judge, the final order shall be subject to review, on appeal, by the court
of appeals for the circuit in which the proceeding is held.

8 (b) There shall be no right of appeal from a final order in a proceeding to test the
9 validity of a warrant to remove to another district or place for commitment or trial
10 a person charged with a criminal offense against the United States, or to test the
11 validity of such person’s detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an
12 appeal may not be taken to the court of appeals from–

13 (A) the final order in a habeas corpus proceeding in which the
14 detention complained of arises out of process issued by a State
court; or

15 (B) the final order in a proceeding under section 2255.

16 (2) A certificate of appealability may issue under paragraph (1) only if the
17 applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which
18 specific issue or issues satisfy the showing required by paragraph (2).

19 If a court denies a petitioner’s petition, the court may only issue a certificate of appealability
20 “if jurists of reason could disagree with the district court’s resolution of his constitutional claims or
21 that jurists could conclude the issues presented are adequate to deserve encouragement to proceed
22 further.” Miller-El, 123 S.Ct. at 1034; Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the
23 petitioner is not required to prove the merits of his case, he must demonstrate “something more than
24 the absence of frivolity or the existence of mere good faith on his . . . part.” Miller-El, 123 S.Ct. at
1040.

25 In the present case, the Court finds that reasonable jurists would not find the Court’s
26 determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or
27 deserving of encouragement to proceed further. Petitioner has not made the required substantial
28 showing of the denial of a constitutional right. Accordingly, the Court hereby **DECLINES** to issue a

1 certificate of appealability.

2 **ORDER**

3 Accordingly, IT IS HEREBY ORDERED:

- 4 1) The petition for writ of habeas corpus is DISMISSED as successive;
5 2) The Clerk of Court is DIRECTED to enter judgment and close the case; and
6 3) The Court DECLINES to issue a certificate of appealability.

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8 IT IS SO ORDERED.

9 **Dated: June 1, 2010**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

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