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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11	STEPHEN R. FEGAN,	)	1:10-cv-01690-JLT HC
12	Petitioner,	)	F&R TO DISMISS PETITION FOR WRIT OF
13	v.	)	CORAM NOBIS (Doc. 1)
14	WARDEN, California State Prison,	)	ORDER DIRECTING OBJECTIONS TO BE
15	Respondent.	)	FILED WITHIN TWENTY DAYS
16		)	ORDER DIRECTING CLERK OF COURT
		)	TO ASSIGN CASE TO UNITED STATES
		)	DISTRICT JUDGE

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18 **PROCEDURAL HISTORY**

19 Petitioner is a state prisoner proceeding pro se with a petition for writ of coram nobis. The
20 instant petition was filed on September 16, 2010. (Doc. 1).

21 A. Preliminary Review of Petition.

22 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition
23 if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is
24 not entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases.
25 The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of
26 habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to
27 dismiss, or after an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th
28 Cir.2001).

1 B. Petitioner Cannot Bring A Petition For Writ Of Coram Nobis

2 Petitioner may not avail himself of a writ of coram nobis to attack a prior state court
3 conviction. Coram nobis relief is available only to challenge federal convictions. See Yasui v.
4 United States, 772 F.2d 1496, 1498 (9th Cir. 1985)(“the writ of error coram nobis fills a void in the
5 availability of post-conviction remedies in *federal* criminal cases”). “It is well settled that the writ of
6 error coram nobis is not available in federal court to attack state criminal judgments. A writ of error
7 coram nobis can only issue to aid the jurisdiction of the court in which the conviction was had.”
8 Sinclair v. Louisiana, 679 F.2d 513, 514 (5th Cir. 1982); see Obado v. New Jersey, 328 F.3d 716, 718
9 (3d Cir. 2003)(coram nobis unavailable in a federal court as means of attack on state criminal
10 judgment); Lowery v. McCaughtry, 954 F.2d 422, 423 (7th Cir. 1992)(same); Sinclair v. Louisiana,
11 679 F.2d at 514 (same); Thomas v. Cunningham, 335 F.2d 67, 69 (4th Cir. 1964)(same); Rivenburgh
12 v. Utah, 299 F.2d 842, 843 (10th Cir. 1962)(same). As the Fifth circuit explained: “A federal court
13 which did not impose the sentence has no jurisdiction to issue a writ of error coram nobis regardless
14 of whether it is called coram nobis, habeas corpus or some other type of relief.” Sinclair, 679 F.2d at
15 514. Further, the writ of error coram nobis “cannot be used as a substitute for habeas corpus or as a
16 collateral writ of error between state and federal jurisdictions.” Rivenburgh, 299 F.2d at 843; see
17 Madigan v. Wells, 224 F.2d 577, 578 (9th Cir. 1955).

18 The Court has accessed its own electronic records and determined that Petitioner has brought
19 four prior habeas corpus petitions in this Court, each attacking his 1995 Merced County conviction
20 and sentence for two homicides, burglary, arson, and abduction of a child. The first petition was
21 filed in case number 1:99-cv-06427 and was denied on the merits. Petitioner brought a second
22 petition, assigned case number 1:06-cv-00531, which was dismissed as a “second and successive”
23 petition on June 14, 2007. Petitioner then brought a third petition attacking his 1995 conviction, in
24 case number 1:08-cv-01140, which, again, was dismissed as a “second and successive” petition on
25 August 25, 2008. Petitioner wasted little time in filing his fourth habeas petition, which is dated
26 September 9, 2008 and was filed on September 15, 2008, in case number 1:08-cv-01373. The Court,
27 apparently unaware of Petitioner’s earlier habeas efforts, dismissed the petition on March 3, 2010 as
28 untimely rather than as successive.

1 The instant petition for writ of coram nobis does not specify what conviction Petitioner is
2 challenging. However, it is clear from a careful reading of Petitioner's claims that he is challenging
3 the same state court conviction for which he has been incarcerated since 1995. The petition indicates
4 that Petitioner is raising the purportedly improper admission of a confession at trial, ineffective
5 assistance of Petitioner's trial counsel, the constitutionality of California's special circumstances, and
6 various jury instructions. (Doc. 1, p. 1).

7 Petitioner has apparently realized that he cannot proceed with a habeas corpus challenge to
8 his 1995 conviction without the prior consent of the United States Court of Appeals, Ninth Circuit,
9 to file a second and successive habeas petition. Therefore, he has tacked in a different direction by
10 re-packaging his claims as a writ of coram nobis. However, this approach is not well taken either.
11 As discussed above, because Petitioner is a state prisoner challenging a state conviction, he cannot
12 proceed in federal court with a writ of coram nobis. Yasui, 772 F.2d at 1498.

13 C. As A Habeas Corpus Petition, The Petition Is A Second And Successive Petition.

14 If the Court were to alternatively construe the petition as one for habeas corpus, Petitioner
15 would not fare better. A federal court must dismiss a second or successive petition that raises the
16 same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The Court must also dismiss a second or
17 successive petition raising a new ground unless the petitioner can show that 1) the claim rests on a
18 new, retroactive, constitutional right or 2) the factual basis of the claim was not previously
19 discoverable through due diligence, and these new facts establish by clear and convincing evidence
20 that but for the constitutional error, no reasonable fact-finder would have found the applicant guilty
21 of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court that
22 decides whether a second or successive petition meets these requirements, which allow a petitioner
23 to file a second or successive petition.

24 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this
25 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an
26 order authorizing the district court to consider the application." In other words, Petitioner must
27 obtain leave from the Ninth Circuit before he can file a second or successive petition in district court.
28 See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or

1 successive petition unless the Court of Appeals has given Petitioner leave to file the petition because
2 a district court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United
3 States, 129 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997),
4 *cert. denied*, 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

5 Because the instant petition was filed after April 24, 1996, the provisions of the Antiterrorism
6 and Effective Death Penalty Act of 1996 (“AEDPA”) apply to this case. Lindh v. Murphy, 521 U.S.
7 320, 327 (1997). Petitioner makes no showing that he has obtained prior leave from the Ninth
8 Circuit to file his successive petition attacking his 1995 Merced County conviction. That being so,
9 even were this Court to construe the petition for writ of coram nobis as a habeas corpus petition, this
10 Court would have no jurisdiction to consider Petitioner's claims from that 1995 conviction under
11 Section 2254. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991. If Petitioner desires to
12 proceed in bringing this petition for writ of habeas corpus, he must first file for leave to do so with
13 the Ninth Circuit. See 28 U.S.C. § 2244 (b)(3).

14 Because Petitioner cannot proceed in federal court to challenge the prior state court
15 conviction under either federal habeas law or pursuant to a writ of error coram nobis, this case may
16 not proceed and should be dismissed.

17 **ORDER**

18 For the foregoing reasons, the Court HEREBY ORDERS as follows:

- 19 1. The Clerk of the Court is DIRECTED to assign this case to a United States District
20 Judge.

21 **RECOMMENDATIONS**

22 Accordingly, the Court HEREBY RECOMMENDS as follows:

- 23 1. The petition for writ of coram nobis should be dismissed.

24 This Findings and Recommendation is submitted to the United States District Judge assigned
25 to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules
26 of Practice for the United States District Court, Eastern District of California. Within twenty days
27 after being served with a copy, any party may file written objections with the court and serve a copy
28 on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and

1 Recommendation.” The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C.
2 § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may
3 waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).
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5 IT IS SO ORDERED.

6 Dated: September 22, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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