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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAVID TYRONE FORD,

1:11-cv-00333-DLB (HC)

Petitioner,

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS WITHOUT PREJUDICE, DIRECTING CLERK OF COURT TO TERMINATE ACTION, AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

v.

K. PROSPER, Warden

Respondent.

[Doc. 1]

Petitioner is 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), Petitioner has consented to the jurisdiction of the United States Magistrate Judge. Local Rule 305(b).

Petitioner filed the instant petition for writ of habeas corpus on February 25, 2011. Petitioner challenges a 2000 Kern County conviction of robbery with use of a weapon, plus enhancements. Petitioner contends that his prior plea agreement was breached by the Kern County Superior Court’s use of a single plea agreement as two strike enhancements.

Petitioner has previously filed a petition for writ of habeas corpus in this Court, in case number 1:08-cv-00384 DLB (HC), Ford v. Prosper, which was dismissed with prejudice as untimely on July 24, 2008.¹ Petitioner filed a notice of appeal on March 1, 2007, and the Ninth Circuit Court of Appeals denied a certificate of appealability on September 7, 2007. (See Dismissal Order, ECF No. 16, in 1:08-cv-00384-DLB (HC).)

¹ In that petition, Petitioner also challenged his sentence under California’s Three Strikes law.

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 A second or successive petition for habeas corpus is not considered "successive" if the
24 initial habeas petition was dismissed for a technical or procedural reason versus on the merits.
25 See Slack v. McDaniel, 529 U.S. 473, 485-87 (2000) (holding that a second habeas petition is not
26 successive if the initial habeas petition was dismissed for failure to exhaust); Stewart v.
27 Martinez-Villareal, 523 U.S. 637, 643-45 (1998) (a second habeas petition is not successive if the
28 claim raised in the first petition was dismissed by the district court as premature.)

1 The prior petition in 1:08-cv-00384-DLB (HC) was dismissed with prejudice as time-
2 barred by the statute of limitations. Although a dismissal based on the statute of limitations does
3 not include an examination of the merits of the petition, it nonetheless operates and is equivalent
4 to a final judgment on the merits. See e.g. McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir.
5 2009); see also Villanueva v. U.S., 346 F.3d 55, 60 (2d Cir. 2003); Altman v. Benik, 337 F.3d
6 764, 766 (7th Cir. 2003).

7 A dismissal based on untimeliness under the statute of limitations bars further review of
8 the action. Therefore, because the prior petition was adjudicated “on the merits,” the instant
9 petition is a “second or successive petition” under § 2244(b).

10 Although Petitioner attaches an application for leave to file a successive petition,
11 Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file the
12 instant petition attacking the same conviction. That being so, this Court has no jurisdiction to
13 consider Petitioner's renewed application for relief from that conviction under § 2254 and must
14 dismiss the petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991. If Petitioner
15 desires to proceed in bringing this petition for writ of habeas corpus, he must file for leave to do
16 so with the Ninth Circuit Court of Appeals. See 28 U.S.C. § 2244 (b)(3).

17 **ORDER**

18 Accordingly, IT IS HEREBY ORDERED that:

- 19 1. The petition for writ of habeas corpus be DISMISSED without prejudice as a
20 successive petition;
- 21 2. The Clerk of Court is directed to terminate this action; and
- 22 3. The court declines to issue a Certificate of Appealability. 28 U.S.C. § 2253(c);
23 Slack v. McDaniel, 529 U.S. 473, 484 (2000) (in order to obtain a COA,
24 petitioner must show: (1) that jurists of reason would find it debatable whether the
25 petition stated a valid claim of a denial of a constitutional right; and (2) that jurists
26 of reason would find it debatable whether the district court was correct in its
27 procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). In the present
28 case, the Court does not find that jurists of reason would not find it debatable

1 whether the petition was properly dismissed without prejudice as successive under
2 28 U.S.C. § 2244(b)(1). Petitioner has not made the required substantial showing
3 of the denial of a constitutional right.

4 IT IS SO ORDERED.

5 **Dated: March 14, 2011**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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