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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

TIMOTHY HISSONG,

1:11-cv-00344-AWI-SMS (HC)

Petitioner,

FINDINGS AND RECOMMENDATION  
REGARDING PETITION FOR WRIT OF  
HABEAS CORPUS

v.

[Doc. 1]

STATE OF CALIFORNIA,

Respondent.

Petitioner is proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner filed the instant petition for writ of habeas corpus on February 28, 2011. Petitioner challenges a Tulare County conviction of robbery and lewd and lascivious conduct. 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 challenging the same conviction, in case number 1:07-cv-01383 AWI SMS (HC), Hissong v. Walker, which was denied on the merits on December, 2008.

**DISCUSSION**

Because the current petition was filed after April 24, 1996, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). A federal court must dismiss a second or

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

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

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

25 The prior petition in 1:07-cv-01383-AWI-SMS (HC) was denied on the merits. The  
26 instant petition for writ of habeas corpus is successive, and Petitioner makes no showing that he  
27 has obtained prior leave from the Ninth Circuit to file the instant petition. That being so, this  
28 Court has no jurisdiction to consider Petitioner's renewed application for relief from that

1 conviction under § 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at 1277;  
2 Nunez, 96 F.3d at 991. If Petitioner desires to proceed in bringing this petition for writ of habeas  
3 corpus, he must file for leave to do so with the Ninth Circuit Court of Appeals. See 28 U.S.C. §  
4 2244 (b)(3).

5 **RECOMMENDATION**

6 Accordingly, IT IS HEREBY RECOMMENDED that:

- 7 1. The petition for writ of habeas corpus be DISMISSED without prejudice as a  
8 successive petition; and  
9 2. The Clerk of Court be directed to terminate this action.

10 This Findings and Recommendation is submitted to the assigned United States District  
11 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the  
12 Local Rules of Practice for the United States District Court, Eastern District of California.

13 Within thirty (30) days after being served with a copy, any party may file written objections with  
14 the court and serve a copy on all parties. Such a document should be captioned “Objections to  
15 Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served  
16 and filed within fourteen (14) days after service of the objections. The Court will then review the  
17 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that  
18 failure to file objections within the specified time may waive the right to appeal the District  
19 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20  
21  
22 IT IS SO ORDERED.

23 **Dated:** March 15, 2011

/s/ Sandra M. Snyder  
UNITED STATES MAGISTRATE JUDGE