

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BARBARA LYNN CHAVEZ,

1:12-cv-00567-LJO-DLB (HC)

Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

v.

[Doc. 1]

WALTER MILLER,

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 April 11, 2012. Petitioner challenges a 1999 conviction of first degree murder, second degree burglary, attempted robbery, and conspiracy. Petitioner is currently serving a sentence of life without the possibility of parole.

Petitioner has previously filed a petition for writ of habeas corpus in this Court on May 13, 2005 in 1:05-cv-00490-OWW-DLB (HC), challenging the same 1999 conviction. The petition was dismissed as untimely on January 11, 2007. The Ninth Circuit Court of Appeals affirmed the dismissal on June 18, 2010.

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 As previous stated, the prior petition in 1:05-cv-00490-OWW-DLB (HC) was dismissed
26 as untimely and judgment was entered. A petition that is dismissed as time-barred constitutes an
27 adjudication on the merits for successive purposes. McNabb v. Yates, 576 F.3d 1028, 1030 (9th
28 Cir. 2009); see also Quezada v. Smith, 624 F.3d 514, 518 (2d Cir. 2010); Altman v. Benik, 337

1 F.3d 764, 766 (7th Cir. 2003). Because the prior petition was adjudicated “on the merits,” the
2 instant petition is a “second or successive petition” under § 2244(b) that must be dismissed to re-
3 filing if Petitioner seeks and obtains approval in the Ninth Circuit Court of Appeals to file a
4 second or successive petition.

5 RECOMMENDATION

6 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 7 1. The instant petition for writ of habeas corpus is DISMISSED; and
8 2. The Clerk of Court be directed to terminate this action.

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

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

19 IT IS SO ORDERED.

20 **Dated: April 17, 2012**

/s/ Dennis L. Beck
21 UNITED STATES MAGISTRATE JUDGE
22
23
24
25
26
27
28