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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DOYLE WAYNE DAVIS,

v.

DIAZ, Warden,

Petitioner,

Respondent.

Case No. 1:13-cv-00736 MJS (HC)

**FINDINGS AND RECOMMENDATION TO
DISMISS SUCCESSIVE PETITION FOR
WRIT OF HABEAS CORPUS PURSUANT
TO 28 U.S.C. § 2244(b)**

**ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT COURT JUDGE TO
THE PRESENT MATTER**

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

In the petition filed on May 17, 2013, Petitioner challenges his February 20, 1992 conviction from the Tulare County Superior Court for multiple counts of forcible rape, forcible oral copulation, forcible sodomy, assault, false imprisonment, dissuading a witness, and furnishing alcohol to a minor. A review of the Court’s dockets and files shows Petitioner has previously sought habeas relief with respect to this conviction. In case number 1:01-cv-05961-NEW, Petitioner challenged the same underlying conviction. On June 18, 2002, the petition was denied on the merits.

I. DISCUSSION

A court must dismiss a second or successive petition that raises the same

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

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

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

1 **II. ORDER AND RECOMMENDATION**

2 The Court ORDERS the Clerk of Court to assign a United States District Court
3 Judge to the present matter.

4 The Court RECOMMENDS that the petition for writ of habeas corpus be
5 DISMISSED as successive.

6 These findings and recommendations are submitted to the United States District
7 Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636
8 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,
9 Eastern District of California. Within thirty (30) days after being served with a copy, any
10 party may file written objections with the Court and serve a copy on all parties. Such a
11 document should be captioned "Objections to Magistrate Judge's Findings and
12 Recommendations." Replies to the objections shall be served and filed within fourteen
13 (14) days (plus three days if served by mail) after service of the objections. The Court
14 will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). The
15 parties are advised that failure to file objections within the specified time may waive the
16 right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: May 22, 2013

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE