

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

ANDY DELGADO RODRIGUEZ,
Petitioner,
v.
KATHY MENDOZA-POWERS, Warden,
Respondent.

Case No. 1:13-cv-01513-AWI-SAB-HC
FINDINGS AND RECOMMENDATION
REGARDING SUCCESSIVE PETITION
FOR WRIT OF HABEAS CORPUS

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 September 18, 2013, Petitioner challenges his 1997 conviction sustained in Tulare County Superior Court for: attempted willful, deliberate and premeditated murder; assault with a firearm; two counts of second degree robbery with a firearm; two counts of false imprisonment by violence; arson; attempted second degree robbery while armed with a firearm; and unlawful taking of a vehicle. A review of the Court's dockets and files shows Petitioner has previously sought habeas relief with respect to this conviction in Rodriguez v. Yates, Case No. 1:09-CV-00119-AWI-SMS-HC. In that case, the petition was dismissed with prejudice as time-barred. Petitioner appealed the dismissal to the Ninth Circuit Court of Appeals, and the appeal was denied on June 16, 2011.

1 I.

2 DISCUSSION

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

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

21 Because the current petition was filed after April 24, 1996, the provisions of the
22 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current
23 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has
24 obtained prior leave from the Ninth Circuit to file his successive petition attacking the
25 conviction. That being so, this Court has no jurisdiction to consider Petitioner's renewed
26 application for relief from that conviction under Section 2254 and must dismiss the petition. See
27 Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991.

28 ///

1 **II.**

2 **RECOMMENDATION**

3 Accordingly, the Court HEREBY RECOMMENDS that the petition for writ of habeas
4 corpus be DISMISSED as successive.

5 This Findings and Recommendation is submitted to the Honorable Anthony W. Ishii,
6 United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and
7 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of
8 California.

9 Within thirty (30) days after being served with a copy, Petitioner may file written
10 objections with the Court. Such a document should be captioned “Objections to Magistrate
11 Judge’s Findings and Recommendation.” The Court will then review the Magistrate Judge’s
12 ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections
13 within the specified time may waive the right to appeal the District Court’s order. Martinez v.
14 Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 IT IS SO ORDERED.

16 Dated: November 14, 2013

17 
18 _____
19 UNITED STATES MAGISTRATE JUDGE
20
21
22
23
24
25
26
27
28