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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GERALD TUCKER,

Petitioner,

v.

DANIEL PARAMO,

Respondent.

Case No. 1:15-cv-01164-AWI-SAB-HC

FINDINGS AND RECOMMENDATIONS
REGARDING 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 instant petition, it appears that Petitioner is challenging his 1998 conviction in Fresno County Superior Court for failure to register as a sex offender. However, the Court notes that Petitioner also refers to his 2002 conviction for possession of a weapon by an inmate.

Petitioner previously filed a prior federal petition for writ of habeas corpus in this district with respect to his 1998 conviction. See Tucker v. Garcia, Case No. 1:03-cv-05594-AWI-TAG. In that action, the court dismissed the habeas petition on February 24, 2004, and Petitioner did not appeal that decision to the Ninth Circuit. Petitioner previously filed a federal habeas petition with respect to his 2002 conviction for possession of a weapon by an inmate. See Tucker v. Ryan, 1:04-cv-05773-LJO-TAG. On April 17, 2008, the petition was denied on the merits. The Ninth Circuit denied Petitioner's request for a certificate of appealability on February 23, 2009.

1 I.

2 DISCUSSION

3 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
4 petition if it “plainly appears from the petition and any attached exhibits that the petitioner is not
5 entitled to relief in the district court” Rule 4 of the Rules Governing Section 2254 Cases.

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

14 Section 2244(b)(3)(A) provides: “Before a second or successive application permitted by
15 this section is filed in the district court, the applicant shall move in the appropriate court of
16 appeals for an order authorizing the district court to consider the application.” In other words,
17 Petitioner must obtain leave from the Ninth Circuit before he can file a second or successive
18 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must
19 dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave
20 to file the petition because a district court lacks subject-matter jurisdiction over a second or
21 successive petition. Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997), *cert. denied*,
22 117 S.Ct. 794 (1997).

23 Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to
24 file his successive petition. As previously stated, Petitioner previously filed a federal petition for
25 writ of habeas corpus in this Court challenging his 1998 conviction for failure to register as a sex
26 offender and a federal petition for writ of habeas corpus in this Court challenging his 2002
27 conviction for possession of a weapon by an inmate. See Tucker v. Garcia, Case No. 1:03-cv-
28 05594-AWI-TAG; Tucker v. Ryan, 1:04-cv-05773-LJO-TAG. The petition challenging the

1 1998 conviction was dismissed and the petition challenging the 2002 conviction was denied.
2 Therefore, whether the instant petition challenges the 1998 conviction or the 2002 possession of
3 a weapon by an inmate conviction, it is successive. As Petitioner has not obtained prior leave
4 from the Ninth Circuit to file this successive petition, this Court has no jurisdiction to consider
5 Petitioner's renewed application for relief under Section 2254 and must dismiss the petition. See
6 Greenawalt, 105 F.3d at 1277.

7 **II.**

8 **RECOMMENDATIONS**

9 Based on the foregoing, IT IS HEREBY RECOMMENDED that the petition for writ of
10 habeas corpus be DISMISSED as successive.

11 This Findings and Recommendation is submitted to the assigned United States District
12 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
13 Rules of Practice for the United States District Court, Eastern District of California. Within
14 fourteen (14) days after service of the Findings and Recommendation, Petitioner may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 "Objections to Magistrate Judge's Findings and Recommendation." The assigned District Judge
17 will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). Petitioner
18 is advised that failure to file objections within the specified time may result in the waiver of
19 rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.
20 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

21 IT IS SO ORDERED.

22 Dated: August 19, 2015

23 
24 UNITED STATES MAGISTRATE JUDGE