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

W.C. SPIVEY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

Case No. 1:16-cv-00159 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 under 28 U.S.C. § 2254.

In the petition filed on January 29, 2015, Petitioner challenges a May 22, 2008 conviction in the Superior Court of California, County of Merced for first degree murder and robbery. Petitioner was sentenced to an indeterminate state prison term of life without the possibility of parole.

A review of the Court’s dockets and files shows Petitioner has previously sought habeas relief with respect to this conviction. In case number 1:12-cv-00206-LJO-SKO (HC), Petitioner challenged the same underlying conviction. On May 26, 2015, the

1 petition was denied on the merits. See Spivey v. McDonald, E.D. Cal. Case No. 1:12-cv-
2 00206-LJO-SKO (HC), ECF Nos. 40, 42.

3 **I. DISCUSSION**

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

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

24 Because the current petition was filed after April 24, 1996, the provisions of the
25 Antiterrorism and Effective Death Penalty Act of 1996 apply to Petitioner's current
26 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that
27 he has obtained prior leave from the Ninth Circuit to file his successive petition attacking
28 the conviction. That being so, this Court has no jurisdiction to consider Petitioner's

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

5 **II. ORDER AND RECOMMENDATION**

6 The Court RECOMMENDS that the petition for writ of habeas corpus be
7 DISMISSED as successive. Further, the Court ORDERS the Clerk of Court to assign a
8 District Court judge to the instant matter.

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

18 The parties are advised that failure to file objections within the specified time may
19 waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834,
20 839 (9th Cir. 2014).

21
22 IT IS SO ORDERED.

23 Dated: February 4, 2016

24 /s/ Michael J. Seng
25 UNITED STATES MAGISTRATE JUDGE
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