

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL JACOBSEN,

Petitioner,

V.

SHERIFF MARGARET MIMMS.

Respondent.

Case No. 1:17-cv-00128-JLT (HC)

FINDINGS AND RECOMMENDATION TO DISMISS SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS

ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT JUDGE

[TWENTY-ONE DAY OBJECTION
DEADLINE]

On January 27, 2017, Petitioner filed the instant petition for writ of habeas corpus in this Court.

Because the petition is successive, the Court will recommend it be **DISMISSED**.

PROCEDURAL BACKGROUND

On January 7, 2003, Petitioner was convicted in the Fresno County Superior Court after pleading no contest to one count of felony domestic violence. He also admitted that he had personally used a knife in the commission of the offense and that he had personally inflicted great bodily injury on the victim.

The instant petition challenges the 2003 conviction and raises two claims for relief. He alleges the conviction was wrongly obtained after the prosecution's investigator lied on the stand at the preliminary hearing. He also claims his plea of no contest should not have been accepted by the trial court because he was being represented by a firm that had previously conflicted out.

The instant petition is not Petitioner's first federal petition. On September 13, 2006, Petitioner

1 filed a federal petition for writ of habeas corpus in this Court challenging the same conviction. See
2 Jacobsen v. Evans, Case No.: 1:06-cv-01254-LJO-WMW (HC). The petition raised one claim of
3 ineffective assistance of counsel and concerned the entry of plea. The District Court dismissed the
4 petition on February 6, 2008, as barred by the statute of limitations. Petitioner appealed to the Ninth
5 Circuit Court of Appeals on March 4, 2008, and the appellate court denied the appeal on November 7,
6 2008.

7 **DISCUSSION**

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

16 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this
17 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an
18 order authorizing the district court to consider the application." In other words, Petitioner must obtain
19 leave from the Ninth Circuit before he can file a second or successive petition in district court. See
20 Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive
21 petition unless 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. Burton v. Stewart, 549 U.S. 147,
23 152 (2007); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001).

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

1 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991.

2 **ORDER**

3 Accordingly, the Clerk of Court is DIRECTED to assign a District Judge to this case.

4 **RECOMMENDATION**

5 For the foregoing reasons, the Court RECOMMENDS that the petition be DISMISSED as
6 successive.

7 This Findings and Recommendation is submitted to the United States District Court Judge
8 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
9 Local Rules of Practice for the United States District Court, Eastern District of California. Within
10 twenty-one days after being served with a copy, Petitioner may file written objections with the Court.
11 Such a document should be captioned "Objections to Magistrate Judge's Findings and
12 Recommendation." The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. §
13 636 (b)(1)(C). Petitioner is advised that failure to file objections within the specified time may waive
14 the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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16 IT IS SO ORDERED.

17 Dated: January 31, 2017

18 /s/ Jennifer L. Thurston
19 UNITED STATES MAGISTRATE JUDGE
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