

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

GREGORY W. STEWART,

Petitioner,

v.

J. MACOMBER, Warden,

Respondent.

Case No. 1:17-cv-00415-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 March 22, 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**.

DISCUSSION

On September 15, 1994, Petitioner was convicted in the Merced County Superior Court of sale of a controlled substance. This petition raises multiple challenges to the conviction. Petitioner has filed numerous federal habeas petitions in this Court challenging this same conviction. See Stewart v. McGrath, No. 1:00-cv-05452-SMS (dismissed as untimely); Stewart v. Sullivan, No. 1:06-cv-01400-WMW (dismissed as unauthorized successive petition); Stewart v. Adams, No. 1:09-cv-00685-GSA (same); Stewart v. Adams, No. 1:09-02212-JLT (same); Stewart v. Adams, No. 1:10-cv-00954-AWI-DLB (same); Stewart v. Macomber, No. 1:11-cv-00814-DLB (same); Stewart v. Macomber, No. 1:12-cv-00594-JLT (same); Stewart v.

1 Macomber, No. 1:14-cv-00266-AWI-MJS (same); Stewart v. Macomber, No. 1:15-cv-00051-
2 SKO (same); Stewart v. Macomber, No. 1:15-cv-01592-SMS (same); Stewart v. Macomber, No.
3 1:16-cv-01428-EPG (same).

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

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

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.

1 **ORDER**

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

3 **RECOMMENDATION**

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

6 This Findings and Recommendation is submitted to the United States District Court
7 Judge assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and
8 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of
9 California. Within twenty-one 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: March 30, 2017

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