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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

9 GREGORY W. STEWART,

10 Petitioner,

11 v.

12 J. MACOMBER,

13 Respondent.

Case No. 1:17-cv-00683-SAB-HC

ORDER DISMISSING PETITION FOR  
WRIT OF HABEAS CORPUS, DIRECTING  
CLERK OF COURT TO CLOSE CASE,  
AND DECLINING TO ISSUE A  
CERTIFICATE OF APPEALABILITY

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15 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus  
16 pursuant to 28 U.S.C. § 2254. Petitioner has consented to the jurisdiction of a United States  
17 magistrate judge to conduct all proceedings in this case pursuant to 28 U.S.C. § 636(c). (ECF  
18 No. 4).

19 **I.**

20 **DISCUSSION**

21 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a  
22 habeas petition and allows a district court to dismiss a petition before the respondent is ordered  
23 to file a response, if it “plainly appears from the petition and any attached exhibits that the  
24 petitioner is not entitled to relief in the district court.”

25 **A. Unauthorized Successive Petition**

26 A federal court must dismiss a second or successive petition that raises the same grounds  
27 as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive  
28 petition raising a new ground unless the petitioner can show that (1) the claim rests on a new,

1 retroactive, constitutional right, or (2) the factual basis of the claim was not previously  
2 discoverable through due diligence, and these new facts establish by clear and convincing  
3 evidence that but for the constitutional error, no reasonable factfinder would have found the  
4 applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)–(B). However, it is not the  
5 district court that decides whether a second or successive petition meets these requirements.

6 Section 2244(b)(3)(A) provides: “Before a second or successive application permitted by  
7 this section is filed in the district court, the applicant shall move in the appropriate court of  
8 appeals for an order authorizing the district court to consider the application.” In other words, a  
9 petitioner must obtain leave from the Ninth Circuit before he can file a second or successive  
10 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656–57 (1996). This Court must  
11 dismiss any second or successive petition unless the Court of Appeals has given a petitioner  
12 leave to file the petition because a district court lacks subject-matter jurisdiction over a second or  
13 successive petition. Burton v. Stewart, 549 U.S. 147, 157 (2007).

14 In the instant petition, Petitioner challenges his 1994 conviction in the Merced County  
15 Superior Court for sale of a controlled substance. (ECF No. 1 at 1). Petitioner previously sought  
16 federal habeas relief in this Court with respect to the same conviction multiple times. See Stewart  
17 v. McGrath, No. 1:00-cv-05452-SMS (dismissed as untimely); Stewart v. Sullivan, No. 1:06-cv-  
18 01400-WMW (dismissed as successive); Stewart v. Adams, No. 1:09-cv-00685-GSA (same);  
19 Stewart v. Adams, No. 1:09-cv-02212-JLT (same); Stewart v. Macomber, No. 1:10-cv-00954-  
20 AWI-DLB (same); Stewart v. Macomber, No. 1:11-00814-DLB (same); Stewart v. Macomber,  
21 No. 1:12-cv-00594-JLT (same); Stewart v. Macomber, No. 1:14-cv-00266-AWI-MJS (same);  
22 Stewart v. Macomber, No. 1:15-cv-00051-SKO (same); Stewart v. Macomber, No. 1:15-01592-  
23 SMS (same); Stewart v. Macomber, No. 1:16-cv-00948-EPG (same); Stewart v. Macomber, No.  
24 1:16-cv-01428-EPG (same); Stewart v. Macomber, No. 1:17-cv-00415-AWI-JLT (same).<sup>1</sup>

25 The Court finds that the instant petition is “second or successive” under 28 U.S.C.  
26 § 2244(b). See McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding “dismissal of a

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28 <sup>1</sup> The Court may take judicial notice of its own records in other cases. United States v. Wilson, 631 F.2d 118, 119  
(9th Cir. 1980).

1 first habeas petition for untimeliness presents a ‘permanent and incurable’ bar to federal review  
2 of the underlying claims,” and thus renders subsequent petitions “second or successive”).  
3 Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file his  
4 successive petition. Therefore, this Court has no jurisdiction to consider Petitioner’s renewed  
5 application for relief under 28 U.S.C. § 2254 and must dismiss the petition. See Burton, 549 U.S.  
6 at 157.

7 **B. Certificate of Appealability**

8 Having found that petitioner is not entitled to habeas relief, the Court now turns to  
9 whether a certificate of appealability should issue. A state prisoner seeking a writ of habeas  
10 corpus has no absolute entitlement to appeal a district court’s denial of his petition, and an appeal  
11 is only allowed in certain circumstances. Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003).  
12 The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C.  
13 § 2253, which provides as follows:

14 (a) In a habeas corpus proceeding or a proceeding under section  
15 2255 before a district judge, the final order shall be subject to  
16 review, on appeal, by the court of appeals for the circuit in which  
the proceeding is held.

17 (b) There shall be no right of appeal from a final order in a  
18 proceeding to test the validity of a warrant to remove to another  
19 district or place for commitment or trial a person charged with a  
criminal offense against the United States, or to test the validity of  
such person’s detention pending removal proceedings.

20 (c) (1) Unless a circuit justice or judge issues a certificate of  
21 appealability, an appeal may not be taken to the court of  
appeals from—

22 (A) the final order in a habeas corpus proceeding in which  
the detention complained of arises out of process issued by  
23 a State court; or

24 (B) the final order in a proceeding under section 2255.

25 (2) A certificate of appealability may issue under paragraph (1)  
26 only if the applicant has made a substantial showing of the  
denial of a constitutional right.

27 (3) The certificate of appealability under paragraph (1) shall  
28 indicate which specific issue or issues satisfy the showing  
required by paragraph (2).

1 If a court denies habeas relief on procedural grounds without reaching the underlying  
2 constitutional claims, the court should issue a certificate of appealability “if jurists of reason  
3 would find it debatable whether the petition states a valid claim of the denial of a constitutional  
4 right and that jurists of reason would find it debatable whether the district court was correct in its  
5 procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). “Where a plain procedural bar  
6 is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist  
7 could not conclude either that the district court erred in dismissing the petition or that the  
8 petitioner should be allowed to proceed further.” Id. In the present case, the Court finds that  
9 reasonable jurists would not find the Court’s determination that Petitioner’s federal habeas  
10 corpus petition should be dismissed debatable or wrong, or that Petitioner should be allowed to  
11 proceed further. Therefore, the Court declines to issue a certificate of appealability.

12 **II.**

13 **ORDER**

14 Accordingly, IT IS HEREBY ORDERED that:

- 15 1. The petition for writ of habeas corpus is DISMISSED as successive;  
16 2. The Clerk of Court is DIRECTED to CLOSE the case; and  
17 3. The Court DECLINES to issue a certificate of appealability.

18 IT IS SO ORDERED.

19 Dated: June 13, 2017



20 UNITED STATES MAGISTRATE JUDGE