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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ELONZA JESSE TYLER,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
BERNARDINO COUNTY,

Respondent.

Case No. 1:17-cv-01376-SAB-HC

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

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has consented to the jurisdiction of the United States Magistrate Judge. (ECF No. 7).

I.

DISCUSSION

A. Unauthorized Successive Petition

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

A federal court must dismiss a second or successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive

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

7 Section 2244(b)(3)(A) provides: “Before a second or successive application permitted by
8 this section is filed in the district court, the applicant shall move in the appropriate court of
9 appeals for an order authorizing the district court to consider the application.” In other words, a
10 petitioner must obtain leave from the Ninth Circuit before he can file a second or successive
11 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must
12 dismiss any second or successive petition unless the Court of Appeals has given a petitioner
13 leave to file the petition because a district court lacks subject-matter jurisdiction over a second or
14 successive petition. Burton v. Stewart, 549 U.S. 147, 157 (2007).

15 In 1997, Petitioner pleaded guilty to attempted murder in the San Bernardino County
16 Superior Court. Petitioner was sentenced to an imprisonment term of seven years to life plus six
17 years. (ECF No. 1 at 2).¹ In the instant petition, Petitioner asserts that his sentence is in excess of
18 the maximum authorized by law, challenges the Board of Parole Hearings’ calculation of his
19 release date, and requests specific performance of his plea agreement. (ECF No. 1 at 7, 16, 21).
20 The petition states that Petitioner previously raised these same claims in the United States
21 District Court for the Central District of California. (ECF No. 1 at 4). Petitioner sought prior
22 federal habeas relief with respect to these claims in Tyler v. Sherman, No. EDCV 16-273-DOC
23 (AJW), 2016 WL 3982335 (C.D. Cal. May 31, 2016), report and recommendation adopted, 2016
24 WL 3982305 (C.D. Cal. July 22, 2016).² The United States District Court for the Central District
25 of California dismissed as successive Petitioner’s challenge to his 1997 conviction and sentence

26 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

27 ² See Fed. R. Evid. 201(b)(2); U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248
28 (9th Cir. 1992) (“[W]e may take notice of proceedings in other courts, both within and without the federal judicial
system, if those proceedings have a direct relation to matters at issue.”) (internal quotation marks and citation
omitted).

1 and denied the remainder of the petition regarding the Parole Board's actions and the alleged
2 breach of the plea agreement. Id.

3 Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to
4 file the instant petition.³ If Petitioner has not obtained prior leave from the Ninth Circuit to file
5 this successive petition, this Court has no jurisdiction to consider Petitioner's renewed
6 application for relief under 28 U.S.C. § 2254 and must dismiss the petition. See Burton, 549 U.S.
7 at 157.

8 **B. Certificate of Appealability**

9 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
10 district court's denial of his petition, and an appeal is only allowed in certain circumstances.
11 Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003). The controlling statute in determining
12 whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

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

16 (b) There shall be no right of appeal from a final order in a
17 proceeding to test the validity of a warrant to remove to another
18 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.

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

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

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

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

26 _____
27 ³ The Court notes that on September 14, 2011, the Ninth Circuit issued an order that Petitioner's "first challenge to
28 the calculation of his release date [] is not a second or successive petition." (ECF No. 1 at 80) (emphasis added).
However, Petitioner previously filed a challenge to the Board's calculation in Tyler v. Sherman, No. EDCV 16-273-
DOC (AJW) (C.D. Cal. 2016).

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

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

11 In the present case, the Court finds that reasonable jurists would not find the Court’s
12 determination that Petitioner’s federal habeas corpus petition should be dismissed debatable or
13 wrong, or that Petitioner should be allowed to proceed further. Therefore, the Court declines to
14 issue a certificate of appealability.

15 **II.**

16 **ORDER**

17 Accordingly, IT IS HEREBY ORDERED that:

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

21 IT IS SO ORDERED.

22 Dated: November 8, 2017

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25 UNITED STATES MAGISTRATE JUDGE