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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GREGORY W. STEWART,
Petitioner,
v.
J. MACOMBER, Warden,
Respondent.

Case No. 1:18-cv-00012-MJS (HC)

**ORDER DIRECTING CLERK'S OFFICE TO
ASSIGN A DISTRICT JUDGE TO THIS
MATTER**

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

(ECF No. 1)

THIRTY (30) DAY OBJECTION DEADLINE

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. He challenges his 1994 conviction in the Merced County Superior Court for sale of a controlled substance. (ECF No. 1.) As Petitioner has previously sought federal habeas relief with respect to the challenged conviction, the Court finds that dismissal of the petition is warranted pursuant to 28 U.S.C. § 2244(b) as an unauthorized successive petition.

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1 **I. Discussion**

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

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

22 Petitioner previously sought federal habeas relief in this Court with respect to the
23 same conviction numerous times. See Stewart v. McGrath, No. 1:00-cv-05452-SMS
24 (dismissed as untimely); Stewart v. Sullivan, No. 1:06-cv-01400-WMW (dismissed as
25 successive); Stewart v. Adams, No. 1:09-cv-00685-GSA (same); Stewart v. Adams, No.
26 1:09-cv-02212-JLT (same); Stewart v. Macomber, No. 1:10-cv-00954-AWI-DLB (same);
27 Stewart v. Macomber, No. 1:11-00814-DLB (same); Stewart v. Macomber, No. 1:12-cv-

1 00594-JLT (same); Stewart v. Macomber, No. 1:14-cv-00266-AWI-MJS (same); Stewart
2 v. Macomber, No. 1:15-cv-00051-SKO (same); Stewart v. Macomber, No. 1:15-01592-
3 SMS (same); Stewart v. Macomber, No. 1:16-cv-00948-EPG (same); Stewart v.
4 Macomber, No. 1:16-cv-01428-EPG (same); Stewart v. Macomber, No. 1:17-cv-00415-
5 AWI-JLT (same); Stewart v. Macomber, No. 1:17-cv-00683-SAB (same).

6 The Court finds that the instant petition is “second or successive” under 28 U.S.C.
7 § 2244(b). See McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding
8 “dismissal of a first habeas petition for untimeliness presents a ‘permanent and
9 incurable’ bar to federal review of the underlying claims,” and thus renders subsequent
10 petitions “second or successive”). Petitioner makes no showing that he has obtained
11 prior leave from the Ninth Circuit to file his successive petition attacking the conviction.
12 That being so, this Court has no jurisdiction to consider Petitioner's renewed application
13 for relief under Section 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at
14 1277. If Petitioner desires to proceed in bringing this petition for writ of habeas corpus,
15 he must file for leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244(b)(3).

16 **II. Conclusion and Recommendation**

17 The Clerk of Court is HEREBY DIRECTED to assign a District Judge to this
18 matter. Furthermore, it is HEREBY RECOMMENDED that the petition for writ of habeas
19 corpus be DISMISSED as successive.

20 The findings and recommendation are submitted to the assigned United States
21 District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and
22 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern
23 District of California. Within thirty (30) days after being served with a copy, Petitioner
24 may file written objections with the Court. Such a document should be captioned
25 “Objections to Magistrate Judge’s Findings and Recommendation.” The Court will then
26 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is
27 advised that failure to file objections within the specified time may result in the waiver of
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1 rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter
2 v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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IT IS SO ORDERED.

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Dated: January 3, 2018

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1st Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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