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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

No. 1:19-cv-00370-SKO (HC)

**FINDINGS AND RECOMMENDATION
TO DISMISS PETITION FOR
LACK OF JURISDICTION**
**COURT CLERK TO ASSIGN DISTRICT
JUDGE**
(Doc. 1)

Petitioner, Gregory W. Stewart, proceeds *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner filed his petition for writ of habeas corpus on March 20, 2019, challenging his 1994 conviction for sale of a controlled substance in the Merced County Superior Court. Petitioner has previously sought federal habeas relief with respect to the challenged petition. Because Petitioner has not sought leave of the Ninth Circuit Court of Appeals to file a second or successive petition, the undersigned recommends that the Court dismiss the petition.

I. Preliminary Screening

Rule 4 of the Rules Governing § 2254 Cases requires the Court to conduct a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules

1 Governing 2254 Cases; *see also Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990). A
2 petition for habeas corpus should not be dismissed without leave to amend unless it appears that no
3 tenable claim for relief can be pled were such leave to be granted. *Jarvis v. Nelson*, 440 F.2d 13,
4 14 (9th Cir. 1971).

5 **II. No District Court Jurisdiction Over Second or Successive Petition**

6 Because Petitioner filed this petition after April 24, 1996, the provisions of the
7 Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) apply. *Lindh v. Murphy*, 521
8 U.S. 320, 327 (1997). When AEDPA applies, a federal court must dismiss a second or successive
9 petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The court must
10 also dismiss a second or successive petition raising a new ground unless the petitioner can show
11 that (1) the claim rests on a new retroactive constitutional right, or (2) the factual basis of the claim
12 was not previously discoverable through due diligence, and the new facts establish, by clear and
13 convincing evidence, that but for the constitutional error, no reasonable factfinder would have
14 found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A) and (B).

15 The circuit court of appeals, not the district court, must decide whether a second or
16 successive petition satisfies the statutory requirements to proceed. 28 U.S.C. §2244(b)(3)(A)
17 (“Before a second or successive petition permitted by this section is filed in the district court, the
18 applicant shall move in the appropriate court of appeals for an order authorizing the district court
19 to consider the application”). This means that a petitioner may not file a second or successive
20 petition in district court until he has obtained leave from the court of appeals. *Felker v. Turpin*, 518
21 U.S. 651, 656-57 (1996). In the absence of an order from the appropriate circuit court, a district
22 court lacks jurisdiction over the petition and must dismiss the second or successive
23 petition. *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir. 1997).

24 Petitioner has not secured leave from the Ninth Circuit Court of Appeals to file the above-
25 captioned petition. Accordingly, the Court recommends dismissing the petition for lack of
26 jurisdiction.

1 **III. Certificate of Appealability**

2 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district
3 court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v.*
4 *Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a
5 certificate of appealability is 28 U.S.C. § 2253, which provides:

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

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

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

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

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

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

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

25 If a court denies a habeas petition, the court may only issue a certificate of appealability "if
26 jurists of reason could disagree with the district court's resolution of his constitutional claims or
27 that jurists could conclude the issues presented are adequate to deserve encouragement to proceed
28 further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Although the
petitioner is not required to prove the merits of his case, he must demonstrate "something more than
the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, 537 U.S.
at 338.

