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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERRY PROFFITT,

Petitioner,

No. CIV S-09-2722 GGH P

vs.

KEN CLARK, Warden,

Respondent.

FINDINGS & RECOMMENDATIONS

_____/

Petitioner, a state prisoner proceeding pro se, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254,¹ together with an application to proceed in forma pauperis.

Petitioner has previously filed at least four petitions for a writ of habeas corpus challenging his 2001 Shasta County conviction on his guilty plea to charges of molesting and performing lewd sexual acts upon a child, pursuant to Cal. Penal Code § 288.5 (continuous sexual abuse of a child under 14 years of age). Plaintiff’s initial petition, CIV S-04-0966 GEB GGH P, was dismissed for a failure to exhaust state court remedies; his second petition, CIV S-06-2143 GEB GGH, was dismissed with prejudice as time-barred; the third petition, CIV S-07-

¹ This case was transferred from the Fresno Division of the Eastern District of California by Order, filed on October 1, 2009.

1 2603 MCE EFB, was dismissed (as duplicative or successive); the fourth petition, CIV S-08-
2 1286 KJM, was also dismissed, the court having found no reason to depart from the ruling of
3 untimeliness in CIV S-S-06-2143 GEB GGH. The instant, or fifth, petition is at a minimum
4 successive; this court finds this petition to constitute a third successive petition challenging the
5 same conviction. “Before a second or successive application ...is filed in the district court, the
6 applicant shall move in the appropriate court of appeals for an order authorizing the district court
7 to consider the application.” 28 U.S.C. § 2244(3)(A). Under Ninth Circuit Rule 22-3, “[i]f a
8 second or successive petition or motion, or an application for leave to file such an application or
9 motion, is mistakenly submitted to the district court, the district court shall refer it to the court of
10 appeals.” The district court has discretion to either transfer that petition to the court of appeals or
11 dismiss the petition. United States v. Winestock, 340 F.3d 200 (4th Cir. 2003)(§ 2255 case);
12 Robinson v. Johnson, 313 F.3d 128, 139-140 (3rd Cir. 2002). In this case, however, because the
13 undersigned does not find petitioner’s claims to be even colorable, the court will recommend
14 dismissal of this action.

15 In addition, the court cautions petitioner that at this point his serial filings fast
16 approach rising to the level of an abuse of process. “Flagrant abuse of the judicial process cannot
17 be tolerated because it enables one person to preempt the use of judicial time that properly could
18 be used to consider the meritorious claims of other litigants.” Molski v. Evergree Dynasty
19 Corp., 500 F.3d 1047, 1057 (9th Cir. 2007) quoting De Long v. Hennessey, 912 F.2d 1144, 1148
20 (9th Cir. 1990). Because petitioner may not proceed with this petition without pre-filing
21 authorization from the Ninth Circuit, this court will not on this filing issue a pre-filing injunction
22 against the instant pro se litigant but petitioner is cautioned not to continue down this path of
23 repetitive, meritless filings.

24 Accordingly, IT IS ORDERED that the Clerk of the Court, pursuant to Local Rule
25 81-190(d), assign District Judge Burrell to this case.

26 IT IS RECOMMENDED that this case be dismissed.

1 These findings and recommendations are submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
3 days after being served with these findings and recommendations, petitioner may file written
4 objections with the court. Such a document should be captioned "Objections to Magistrate
5 Judge's Findings and Recommendations." Petitioner is advised that failure to file objections
6 within the specified time may waive the right to appeal the District Court's order. Martinez v.
7 Ylst, 951 F.2d 1153 (9th Cir. 1991).

8 DATED: October 19, 2009

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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