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

THOMAS T. ALFORD,

Petitioner,

No. CIV S-10-1383 JAM DAD P

vs.

SHASTA COUNTY
SUPERIOR COURT,

Respondent.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On June 11, 2010, the undersigned ordered respondent to file and serve a response to the petition. On August 10, 2010, respondent filed the pending motion to dismiss, arguing that petitioner’s habeas petition is second or successive under 28 U.S.C. § 2244(b). Petitioner has filed an opposition to the motion, and respondent has filed a reply.

BACKGROUND

On March 12, 1996, petitioner pled guilty to second-degree murder with the use of a firearm in the Shasta County Superior Court. The court sentenced petitioner to a state prison term of fifteen years to life plus a ten-year enhancement for the use of a firearm. On December 17, 1996, the California Court of Appeal for the Third Appellate District affirmed the judgment

1 sentence in this court. See No. CIV S-07-1035 GEB DAD P. Respondent notes that this court
2 dismissed the previously-filed habeas action as untimely. Respondent contends that the pending
3 petition challenging the same conviction and sentence must be dismissed because petitioner has
4 not obtained an order from the Ninth Circuit authorizing him to file a second or successive
5 petition as required. (Resp't's Mot. to Dismiss at 3-4.)

6 II. Petitioner's Opposition

7 In opposition to respondent's motion to dismiss, petitioner argues that the habeas
8 petition now pending before this court is not successive because it contains a new claim that he
9 was deprived of his right to DNA testing that was not included in his previously-filed federal
10 petition. (Pet'r's Opp'n to Resp't's Mot. to Dismiss at 1-4.) Petitioner contends that his DNA
11 claim arises from a change in the law in 2006, which purportedly grants him an absolute right to
12 DNA testing. (Id.)

13 III. Respondent's Reply

14 In reply, respondent reiterates that the court lacks jurisdiction to consider
15 petitioner's successive petition because he has not obtained the required prior authorization from
16 the Ninth Circuit. (Resp't's Reply at 1-2.)

17 ANALYSIS

18 "A claim presented in a second or successive habeas corpus application under
19 section 2254 that was not presented in a prior application shall be dismissed" 28 U.S.C. §
20 2244(b)(2). This is the case unless,

21 (A) the applicant shows that the claim relies on a new
22 rule of constitutional law, made retroactive to cases on
23 collateral review by the Supreme Court, that was previously
unavailable; or

24 (B)(i) the factual predicate for the claim could not have
25 been discovered previously through the exercise of due
diligence; and

26 ////

1 (ii) the facts underlying the claim, if proven and viewed
2 in light of the evidence as a whole, would be sufficient to
3 establish by clear and convincing evidence that, but for
constitutional error, no reasonable factfinder would have
found the applicant guilty of the underlying offense.

4 28 U.S.C. § 2244(b)(2). Before filing a second or successive petition in the district court, “the
5 applicant shall move in the appropriate court of appeals for an order authorizing the district court
6 to consider the application.” 28 U.S.C. § 2244(b)(3)(A).

7 The court’s own records reveal that petitioner previously filed a petition for writ
8 of habeas corpus in this court attacking the same state court conviction and sentence that he seeks
9 to challenge in this habeas proceeding. See No. CIV S-07-1035 GEB DAD P. In that
10 previously-filed habeas action, the court dismissed petitioner’s application as barred by the
11 AEDPA statute of limitations. The Ninth Circuit has expressly held “that the dismissal of a
12 habeas petition as untimely constitutes a disposition on the merits and that a further petition
13 challenging the same conviction would be ‘second or successive’ for purposes of 28 U.S.C. §
14 2244(b).” McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009). Here, petitioner has not
15 obtained an order from the Ninth Circuit authorizing the district court to consider a second or
16 successive petition as required to proceed with this habeas action. Therefore, this court lacks
17 jurisdiction to entertain the now pending petition. See Burton v. Stewart, 549 U.S. 147, 152
18 (2007). Accordingly, the instant petition should be dismissed without prejudice to its refiling
19 with a copy of an order from the Ninth Circuit Court of Appeals authorizing petitioner to file a
20 second or successive petition.³

21 **OTHER MATTERS**

22 Respondent has informed the court that Kathleen Dickinson is the Acting Warden
23 of California Medical Facility where petitioner is currently housed and requests that the court to
24

25 ³ Both parties have presented arguments regarding the timeliness of the pending petition in
26 their briefing on the motion to dismiss. In light of the recommendation set forth above, however,
the court will not reach the merits of the timeliness arguments.

1 substitute Acting Warden Dickinson as respondent in this matter. Good cause appearing, the
2 court will grant respondent's request.

3 **CONCLUSION**

4 IT IS HEREBY ORDERED that:

5 1. Respondent's August 10, 2010 request to substitute Acting Warden Kathleen
6 Dickinson as respondent in this action (Doc. No. 12) is granted; and

7 2. The Clerk of the Court is directed to amend the docket to reflect that Acting
8 Warden Kathleen Dickinson is the respondent in this action.

9 IT IS HEREBY RECOMMENDED that:

10 1. Respondent's August 10, 2010 motion to dismiss (Doc. No. 12) be granted;

11 2. Petitioner's application for a writ of habeas corpus be dismissed without
12 prejudice to its refileing with a copy of an order from the Ninth Circuit Court of Appeals
13 authorizing petitioner to file a second or successive petition; and

14 3. This action be closed.

15 These findings and recommendations are submitted to the United States District
16 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
17 one days after being served with these findings and recommendations, any party may file written
18 objections with the court and serve a copy on all parties. Such a document should be captioned
19 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
20 shall be served and filed within fourteen days after service of the objections. The parties are
21 advised that failure to file objections within the specified time may waive the right to appeal the
22 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23 DATED: November 3, 2010.

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26 DAD:9
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DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE