

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

ANDRE C. MILOSLAVICH,

Petitioner,

No. CIV S-10-2253 JAM DAD P

vs.

HARRINGTON,

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 September 3, 2010, the undersigned ordered respondent to file and serve a response to the petition. On November 2, 2010, respondent filed the pending motion to dismiss, arguing that petitioner’s habeas petition is a second or successive petition 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, 2004, a San Joaquin County Superior Court jury found petitioner guilty of first-degree robbery. The jury also found that petitioner had a prior serious felony conviction, had served a prior prison term, and had two prior convictions within the meaning of California’s Three Strikes law. Petitioner was subsequently sentenced in the San Joaquin County

1 Superior Court to thirty-two years to life in state prison. On December 7, 2005, the California  
2 Court of Appeal for the Third Appellate District affirmed the judgment of conviction. On March  
3 15, 2006, the California Supreme Court denied review. (Pet. at 2, Resp't's Lodged Docs. 1-4.)

4 On July 3, 2007, petitioner filed a federal petition for writ of habeas corpus in this  
5 court. See Case No. CIV S-07-1315 FCD CMK P.<sup>1</sup> On May 20, 2008, the court dismissed his  
6 federal petition as having been untimely filed. Petitioner then filed three petitions seeking habeas  
7 corpus relief in state court. The San Joaquin County Superior Court, the California Court of  
8 Appeal, and the California Supreme Court all denied him relief. (Resp't's Lodged Docs. 5-14.)  
9 On August 23, 2010, petitioner commenced this action by filing the pending petition.

## 10 **RESPONDENT'S MOTION TO DISMISS**

### 11 I. Respondent's Motion

12 Respondent argues that the court should dismiss the pending petition because it is  
13 successive under 28 U.S.C. § 2244(b). Specifically, respondent argues that prior to filing the  
14 pending petition, petitioner filed a federal habeas petition in this court challenging the same state  
15 court conviction and sentence. See Case No. CIV S-07-1315 FCD CMK P. This court dismissed  
16 the previously-filed habeas action as untimely. Respondent contends that the pending petition  
17 challenging the same conviction and sentence must be dismissed because petitioner has not  
18 obtained an order from the Ninth Circuit as required, authorizing him to file a second or  
19 successive federal habeas petition. (Resp't's Mot. to Dismiss at 3.)

### 20 II. Petitioner's Opposition

21 In opposition to respondent's motion, petitioner acknowledges that he previously  
22 filed a federal petition for writ of habeas corpus in this court but argues that the court dismissed it  
23 as untimely without considering his claims. In petitioner's view, he has acted diligently and this

24 ////

---

25 <sup>1</sup> A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803  
26 F.2d 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

1 court should rule on the merits of his new federal habeas claims. (Pet'r's Opp'n to Resp't's Mot.  
2 to Dismiss at 1-5.)

3 III. Respondent's Reply

4 In reply, respondent reiterates that the court's dismissal of petitioner's prior  
5 habeas petition as untimely renders the pending federal petition successive. Respondent repeats  
6 that the court lacks jurisdiction to consider petitioner's successive petition because he has not  
7 obtained the required prior authorization from the Ninth Circuit. (Resp't's Reply at 2.)

8 **ANALYSIS**

9 "A claim presented in a second or successive habeas corpus application under  
10 section 2254 that was not presented in a prior application shall be dismissed . . . ." 28 U.S.C. §  
11 2244(b)(2). This is the case unless,

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

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

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

19 28 U.S.C. § 2244(b)(2). Before filing a second or successive petition in the district court, "the  
20 applicant shall move in the appropriate court of appeals for an order authorizing the district court  
21 to consider the application." 28 U.S.C. § 2244(b)(3)(A).

22 The court's own records reveal that petitioner previously filed a petition for writ  
23 of habeas corpus in this court attacking the same state court conviction and sentence that he now  
24 seeks to challenge in this habeas proceeding. See Case No. CIV S-07-1315 FCD CMK P. In that  
25 previously-filed habeas action, the court dismissed petitioner's application as barred by the  
26 AEDPA statute of limitations. The Ninth Circuit has expressly held "that the dismissal of a

1 habeas petition as untimely constitutes a disposition on the merits and that a further petition  
2 challenging the same conviction would be ‘second or successive’ for purposes of 28 U.S.C. §  
3 2244(b).” McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009). Here, petitioner has not  
4 obtained an order from the Ninth Circuit authorizing the district court to consider a second or  
5 successive petition as required to proceed with this habeas action. Therefore, this court lacks  
6 jurisdiction to entertain the now pending petition. See Burton v. Stewart, 549 U.S. 147, 152  
7 (2007). Accordingly, the instant petition should be dismissed without prejudice to its refileing  
8 with a copy of an order from the Ninth Circuit Court of Appeals authorizing petitioner to file a  
9 second or successive petition.<sup>2</sup>

#### 10 **OTHER MATTERS**

11 After respondent filed a reply in this matter, petitioner filed a motion for an  
12 extension of time but did not specify why he was seeking additional time. Petitioner then filed  
13 what appears to be an unauthorized response to respondent’s reply. See Local Rule 230(1). In  
14 light of the findings and recommendations herein, the court will deny petitioner’s motion for an  
15 extension of time as moot.

#### 16 **CONCLUSION**

17 IT IS HEREBY ORDERED that petitioner’s January 18, 2011 motion for an  
18 extension of time (Doc. No. 14) is denied as moot.

19 IT IS HEREBY RECOMMENDED that:

- 20 1. Respondent’s November 2, 2010 motion to dismiss (Doc. No. 10) be granted;
- 21 2. Petitioner’s application for a writ of habeas corpus be dismissed without  
22 prejudice to its refileing with a copy of an order from the Ninth Circuit Court of Appeals  
23 authorizing petitioner to file a second or successive petition; and

---

24  
25 <sup>2</sup> In their briefing on the motion to dismiss both parties have presented arguments regarding  
26 the timeliness of the pending petition. In light of the recommendation set forth above, however, the  
court will not reach the merits of those timeliness arguments.

1 3. This action be closed.

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

10 DATED: April 4, 2011.

11  
12   
13 \_\_\_\_\_  
14 DALE A. DROZD  
15 UNITED STATES MAGISTRATE JUDGE

13 DAD:9  
14 milo2253.157