

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

ALONZO JOSEPH,

Petitioner,

No. 2:12-cv-02507-DAD P

vs.

WILLIAM KNIPP,

Respondent.

ORDER

_____ /

Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, an application to proceed in forma pauperis, and a request for the appointment of counsel. Petitioner has consented to Magistrate Judge jurisdiction in this action pursuant to 28 U.S.C. § 636(c). See Docs. No. 4 & 6.

BACKGROUND

On August 9, 1997, a Sacramento County Superior Court jury found petitioner guilty of burglary and receiving stolen property. (Doc. No. 1 at 1.) The California Court of Appeal for the Third Appellate District affirmed the judgment of conviction on appeal, and the California Supreme Court denied review. (Id. at 2.)

On January 3, 2000, many years before the petition now pending before this court was filed, petitioner filed a federal petition for writ of habeas corpus in this court challenging his

1 1997 judgment of conviction entered in the Sacramento County Superior Court. See Case No.
2 2:00-cv-00004-EJG-GGH P.¹ On May 15, 2003, the magistrate judge assigned to that action
3 issued findings and recommendations, recommending that the earlier petition for writ of habeas
4 corpus be denied. On August 5, 2003, District Judge Edward J. Garcia adopted those findings
5 and recommendations in full, denied the petition and closed the case. On November 20, 2003,
6 the United States Court of Appeals for the Ninth Circuit denied petitioner a certificate of
7 appealability in connection with that earlier federal habeas action.

8 On August 26, 2004, petitioner filed a second federal habeas petition challenging
9 his 1997 judgment of conviction. See Case No. 2:04-cv-01780-MCE-GGH P. That action was
10 transferred to the Ninth Circuit Court of Appeals for consideration as a successive petition.

11 On April 23, 2012, petitioner filed yet a third federal habeas petition challenging
12 his 1997 Sacramento County Superior Court conviction. See Case No. 2:12-cv-01061-GGH P.
13 On May 1, 2012, that action was also transferred to the Ninth Circuit Court of Appeals for
14 consideration as a successive petition.

15 Finally, on October 5, 2012, petitioner filed the pending habeas petition which
16 again challenges his 1997 conviction.

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 rule of
22 constitutional law, made retroactive to cases on collateral review
by the Supreme Court, that was previously unavailable; or

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

25 ¹ 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 (ii) the facts underlying the claim, if proven and viewed in light of
2 the evidence as a whole, would be sufficient to establish by clear
3 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 As noted above, the court’s own records reveal that petitioner previously filed
8 three petitions seeking federal habeas relief in this court, all of which attacked the same state
9 court conviction and sentence that he now seeks to challenge in this federal habeas proceeding.
10 In his first habeas action, this court denied petitioner’s application for writ of habeas corpus on
11 the merits. In the case of his second and third federal habeas petitions, those actions were
12 transferred to the Ninth Circuit for consideration as a successive petition. Petitioner did not
13 obtain authority from the U.S. Court of Appeals to proceed with his successive federal habeas
14 petitions as required in order to so proceed. See 28 U.S.C. § 2244(b).

15 In connection with this current federal habeas action, petitioner has again not
16 obtained an order from the Ninth Circuit authorizing the district court to consider a successive
17 petition as required to proceed with this habeas action, so this court lacks jurisdiction to entertain
18 the now pending petition. See Burton v. Stewart, 549 U.S. 147, 152 (2007). Accordingly, the
19 instant petition will be dismissed without prejudice to its refiling with a copy of an order from
20 the Ninth Circuit Court of Appeals authorizing petitioner to file a successive federal habeas
21 petition.

22 In light of this order, the court will not rule on petitioner’s application to proceed
23 in forma pauperis and will deny petitioner’s request for the appointment of counsel.

24 ////

25 ////

26 ////

1 **CONCLUSION**

2 Accordingly, IT IS HEREBY ORDERED that:

3 1. Petitioner’s application for a writ of habeas corpus is dismissed as a second or
4 successive habeas corpus application without prejudice to its refileing with a copy of an order
5 from the Ninth Circuit Court of Appeals authorizing petitioner to file a successive petition;

6 2. Petitioner’s October 5, 2012 request for the appointment of counsel (Doc. No.
7 3) is denied; and

8 3. This action is closed.

9 DATED: October 25, 2012.

10 
11 _____
12 DALE A. DROZD
13 UNITED STATES MAGISTRATE JUDGE

12 DAD:4
13 josep2507.succ