(HC) Mullen v. Warden Doc. 5 1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF CALIFORNIA 10 11 MATTHEW MULLEN, No. 2:17-cv-01115 GGH Petitioner, 12 13 v. ORDER AND FINDINGS AND RECOMMENDATIONS 14 WARDEN, PELICAN BAY STATE PRISON, 15 Respondent. 16 Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus 17 under 28 U.S.C. § 2254. ECF No. 1. Petitioner has requested to proceed with this habeas in 18 forma pauperis and has submitted an affidavit which demonstrates he is unable to afford the costs 19 of suit that meets the requirements of 28 U.S.C. § 1915(a). ECF No. 2. Accordingly, the request 20 to proceed in forma pauperis will be granted. 21 Petitioner challenges the judgment of conviction entered against him on May 5, 2009 in 22 the Tehama County Superior Court for shooting at an uninhabited dwelling, permitting another to 23 discharge a firearm from a vehicle, participating in a street gang, and committing these offenses 24 for the benefit of a gang. ECF No. 1 at 1. The Court records indicate that petitioner has 25

previously filed a petition for relief challenging the same conviction. Civ. 2:13-cv-00165-MCE-EFB. On August 4, 2015 that petition was denied on the merits and the case was closed. 14-cv-166 at ECF 24.

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| 1 | Before a second, or successive, petition is brought a petitioner must bring a motion in the |
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| 2 | Ninth Circuit Court of Appeals for an order authorizing this district court to consider the petition. |
| 3 | 28 U.S.C. § 2244(b)(3)(A). According to the rule set forth in Slack v. McDaniel, 529 U.S. 473, |
| 4 | 485-486 (2000) will be deemed successive for purposes of this code section only where the prior |
| 5 | petition was not adjudicated on the merits. See also Green v. White, 223 F.3d 1001, 1002 n.1 |
| 6 | (9th Cir. 2000) <i>citing</i> <u>Slack</u> , supra. Because the prior habeas action was dismissed on the merits, |
| 7 | the instant petition is second, or successive. |
| 8 | Accordingly, IT IS ORDERED that: |
| 9 | 1. Petitioner's motion to proceed in forma pauperis is GRANTED; |
| 10 | 2. The Clerk of Court shall randomly assign a district judge to this action. |
| 11 | IT IS RECOMMENDED THAT: |
| 12 | 1. This action be dismissed; |
| 13 | 2. The Clerk of the court shall close the file. |
| 14 | These findings and recommendations are submitted to the United States District Judge |
| 15 | assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within 14 days after |
| 16 | being served with these findings and recommendations, petitioner may file written objections |
| 17 | with the court. The document should be captioned "Objections to Magistrate Judge's Findings |
| 18 | and Recommendations." Failure to file objections within the specified time may waive the right |
| 19 | to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). |
| 20 | Dated: June 8, 2017 |
| 21 | /s/ Gregory G. Hollows |
| 22 | UNITED STATES MAGISTRATE JUDGE |
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