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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERRY PROFFITT,
Petitioner,
v.
JOE LAZARRAG, Warden,
Respondent.

No. 2:20-cv-00667 GGH P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

Examination of the in forma pauperis affidavit reveals that petitioner is unable to afford the costs of suit. Accordingly, the request for leave to proceed in forma pauperis (ECF No. 2) is granted. See 28 U.S.C. § 1915(a). Petitioner’s second request to proceed in forma pauperis (ECF No. 6) will be denied as duplicative.

Petitioner challenges his 2001 conviction in the Shasta County Superior Court for charges pursuant to Cal. Penal Code § 288 (lewd and lascivious acts with a minor child) and § 288.5 (continuous sexual abuse of a minor). ECF No. 1. The court’s records reveal that petitioner has previously filed an application for a writ of habeas corpus attacking the conviction and sentence

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1 challenged in this case.¹ The previous application was filed on September 27, 2006 and was
2 dismissed as barred by the statute of limitations pursuant to 28 U.S.C. § 2244(d) on September
3 27, 2007. See Proffitt v. Campbell, 2:06-cv-02143-GEB-GGH, ECF Nos. 1, 101, 104, 105.

4 Before petitioner can proceed with the instant application, he must move in the United States
5 Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider the
6 application. See 28 U.S.C. § 2244(b)(3). Therefore, petitioner's application must be dismissed
7 without prejudice to its re-filing upon obtaining authorization from the United States Court of
8 Appeals for the Ninth Circuit.

9 Due to the court's recommendation that petitioner's federal habeas petition be dismissed
10 as second or successive, petitioner's motion to appoint counsel (ECF No. 3) and motion to attend
11 oral argument (ECF No. 8) are denied as moot.

12 In accordance with the above, IT IS HEREBY ORDERED that:

13 1. Petitioner's application to proceed in forma pauperis (ECF No. 2) is GRANTED;

14 2. Petitioner's second application to proceed in forma pauperis (ECF No. 6) is DENIED
15 as duplicative;

16 3. Petitioner's motion to appoint counsel (ECF No. 3) and motion to attend oral argument
17 (ECF No. 8) are DENIED as moot; and

18 4. The Clerk of the Court shall assign this case to a district judge.

19 Further, IT IS HEREBY RECOMMENDED that this action be dismissed as a second or
20 successive habeas corpus application without prejudice to its refile with a copy of an order from
21 the Ninth Circuit Court of Appeals authorizing petitioner to file a successive petition.

22 These findings and recommendations are submitted to the United States District Judge
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
24 after being served with these findings and recommendations, petitioner may file written

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28 ¹ The court may take judicial notice of court records in other cases. United States v. Howard, 381
F.3d 873, 876 n.1 (9th Cir. 2004).

1 objections with the court. The document should be captioned “Objections to Magistrate Judge’s
2 Findings and Recommendations.” Petitioner is advised that failure to file objections within the
3 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951
4 F.2d 1153 (9th Cir. 1991).

5 Dated: April 20, 2020

6 /s/ Gregory G. Hollows
7 UNITED STATES MAGISTRATE JUDGE
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