

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
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERRY DANIEL PROFFITT,
Petitioner,
v.
PATRICK COVELLO, Warden,
Respondent.

No. 2:20-cv-02433 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. Petitioner has not, however, filed an in forma pauperis affidavit or paid the required filing fee (\$5.00). See 28 U.S.C. §§ 1914(a); 1915(a). Nevertheless, the undersigned will recommend dismissal of the pending petition as second or successive.

Petitioner challenges his 2001 conviction in the Shasta County Superior Court for lewd and lascivious acts with a minor child (Cal. Pen. Code § 288) and continuous sexual abuse of a minor (Cal. Pen. Code § 288.5). ECF No. 1 at 1. The court’s records reveal that petitioner has previously filed an application for a writ of habeas corpus attacking the conviction and sentence challenged in this case. The previous application was filed on September 27, 2006 and was dismissed as barred by the statute of limitations pursuant to 28 U.S.C. § 2244(d) on September 27, 2007. See Proffitt v. Campbell, 2:06-cv-02143-GEB-GGH, ECF Nos. 1, 101, 104, 105. Before petitioner can proceed with the instant application, he must move in the United States

1 Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider the
2 application. See 28 U.S.C. § 2244(b)(3). Petitioner is again reminded that this court is not the
3 proper court to first request authorization to proceed on a second or successive habeas petition.¹
4 See Proffitt v. Lazarrag, 2:20-cv-00667-KJM-GGH, ECF Nos. 11 (On April 20, 2020, the
5 undersigned recommended dismissal of petitioner’s habeas petition as second or successive and
6 informed petitioner the procedures to proceed on a second or successive petition), 20 (adoption of
7 the undersigned’s April 20, 2020 findings and recommendations). Therefore, petitioner’s
8 application must be dismissed without prejudice to its re-filing upon obtaining authorization from
9 the United States Court of Appeals for the Ninth Circuit.

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

- 11 1. Petitioner’s motion to set hearing (ECF No. 3) is denied as moot; and
- 12 2. The Clerk of the Court shall assign this case to a district judge.

13 Further, IT IS HEREBY RECOMMENDED that this action be dismissed as a second or
14 successive habeas corpus application without prejudice to its re-filing with a copy of an order from
15 the Ninth Circuit Court of Appeals authorizing petitioner to file a successive petition.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, petitioner may file written
19 objections with the court. The document should be captioned “Objections to Magistrate Judge’s
20 Findings and Recommendations.” Petitioner is advised that failure to file objections within the
21 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951
22 F.2d 1153 (9th Cir. 1991).

23 Dated: December 29, 2020

24 /s/ Gregory G. Hollows
25 UNITED STATES MAGISTRATE JUDGE

26
27
28

¹ The undersigned notes that the pending habeas petition is also labeled as an “Application for
Successive” petition. See ECF No. 1 at 1.