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E-Filed 3/22/13

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NATHANIEL USHER,
Petitioner,

No. C 13-0766 RS (PR)

ORDER OF DISMISSAL

v.

RICK HILL, Warden,
Respondent.

INTRODUCTION

Petitioner seeks federal habeas relief from his state convictions. The petition for such relief is now before the Court for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases. For the reasons stated herein, the petition is **DISMISSED.**

BACKGROUND

According to the petition, in 1981, an Alameda County Superior Court jury convicted petitioner of first degree murder. Petitioner received a sentence of 25 years-to-life in state prison. Petitioner alleges that his sentence is unconstitutional.

DISCUSSION

This Court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A district court considering an application for a writ of habeas corpus shall “award the writ

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1 or issue an order directing the respondent to show cause why the writ should not be granted,
2 unless it appears from the application that the applicant or person detained is not entitled
3 thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in
4 the petition are vague or conclusory, palpably incredible, or patently frivolous or false. *See*
5 *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

6 The petition is barred by the rule against filing a second or successive petition.
7 Petitioner has filed at least one previous petition regarding this same conviction (and alleging
8 a similar claim) at issue in the instant petition, viz., No. C 10-1816 RS (N.D. Cal. May 25,
9 2010). In order to file a second or successive petition, the petitioner must obtain an order
10 from the court of appeals authorizing the district court to consider the petition. *See* 28 U.S.C.
11 § 2244(b)(3)(A). Because petitioner has not shown that he has received such authorization,
12 the instant petition must be dismissed as second or successive to the prior-filed petition.
13 Accordingly, the petition is DISMISSED.

14 Petitioner’s motion to proceed *in forma pauperis* (Docket Nos. 2 and 4) is DENIED.
15 The papers indicate that he can afford the \$5.00 filing fee for habeas actions. Petitioner is
16 directed to make such payment to the Court forthwith.

17 A certificate of appealability will not issue. Petitioner has not shown “that jurists of
18 reason would find it debatable whether the petition states a valid claim of the denial of a
19 constitutional right and that jurists of reason would find it debatable whether the district court
20 was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The
21 Clerk shall terminate Docket Nos. 2 and 4, enter judgment in favor of respondent, and close
22 the file.

23 **IT IS SO ORDERED.**

24 DATED: March 21, 2013


RICHARD SEEBOR
United States District Judge

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