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3 IN THE UNITED STATES DISTRICT COURT  
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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6 ABDULLAH W. MUSTAFAA,

No. C 07-06488 CW (PR)

7 Petitioner,

ORDER GRANTING RESPONDENT'S  
MOTION TO DISMISS HABEAS  
PETITION AS SECOND OR  
SUCCESSIVE

8 v.

9 D.K. SISTO, Warden,

10 Respondent.

(Docket nos. 4, 7)

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United States District Court  
For the Northern District of California

Petitioner, a state prisoner, filed the present pro se petition for writ of habeas corpus.

Before the Court is Respondent's motion to dismiss the petition as a second or successive petition. Petitioner opposes the motion, and Respondent filed a reply to the opposition.

The record shows that Petitioner has filed a previous petition for a writ of habeas corpus with this Court, challenging the same conviction and sentence. See Case No. C 99-03452 CW (PR). The Court denied the first petition on the merits. (Resp't Ex. 2.) Petitioner filed a notice of appeal, and the Court granted a certificate of appealability (COA) on two claims involving ineffective assistance of counsel. The Ninth Circuit Court of Appeals appointed counsel for Petitioner. Following extensive briefing, on March 31, 2005, the Ninth Circuit affirmed the denial of the Sixth Amendment claims, expanded the COA, and granted relief on the claim that there was insufficient evidence that one of the prior convictions was sustained by Petitioner. (Resp't Ex. 3, 4.)

1 The State sought rehearing, which was granted. On June 7, 2005,  
2 the Ninth Circuit issued a new opinion which again affirmed the  
3 denial of the Sixth Amendment claims, and also found sufficient  
4 evidence that Petitioner had sustained the prior conviction.  
5 (Resp't Exs. 3, 5.) On July 27, 2005, Petitioner filed a petition  
6 for certiorari in the United States Supreme Court. On October 3,  
7 2005, the Supreme Court denied certiorari review. (Resp't Ex. 3.)

8 DISCUSSION

9 The Court finds the present petition is a second or successive  
10 petition attacking the same conviction and sentence as Petitioner's  
11 prior federal habeas petition. A second or successive petition  
12 containing new claims may not be filed in the district court unless  
13 Petitioner first obtains from the United States Court of Appeals an  
14 order authorizing the district court to consider the petition. 28  
15 U.S.C. § 2244(b)(3)(A). Petitioner has not done so.

16 Furthermore, Petitioner's arguments in opposition to the  
17 motion to dismiss are without merit. The Court finds that  
18 Petitioner has filed a petition for a writ of habeas corpus  
19 pursuant to 28 U.S.C. § 2254 because he is a state prisoner being  
20 held "pursuant to the judgment of a State court," 28 U.S.C. § 2254,  
21 and he is challenging his 1996 conviction on the grounds that his  
22 custody is unconstitutional. Petitioner cannot circumvent the bar  
23 against second or successive petitions by labeling his current  
24 petition as proceeding pursuant to 28 U.S.C. § 2241. Nor can  
25 Petitioner rely on the general provisions of 28 U.S.C. § 1651,  
26 which states, "The Supreme Court and all courts established by Act  
27 of Congress may issue all writs necessary or appropriate in aid of

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1 their respective jurisdictions and agreeable to the usages and  
2 principles of law." 28 U.S.C. § 1651.

3 Accordingly, Respondent's motion to dismiss is GRANTED, and  
4 this petition is DISMISSED without prejudice to filing a new habeas  
5 action if Petitioner obtains the necessary order.

6 CONCLUSION

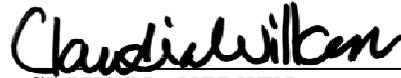
7 For the foregoing reasons, Respondent's motion to dismiss the  
8 petition as a second or successive petition (docket no. 7) is  
9 GRANTED. The petition is DISMISSED pursuant to 28 U.S.C.  
10 § 2244(b).

11 The Clerk of the Court shall enter judgment in accordance with  
12 this Order, terminate all other pending motions as moot, including  
13 Petitioner's motion for judicial notice (docket no. 4), and close  
14 the file.

15 This Order terminates Docket nos. 4 and 7.

16 IT IS SO ORDERED.

17 Dated: 12/15/08



18 CLAUDIA WILKEN  
19 UNITED STATES DISTRICT JUDGE

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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 ABDULLAH W. MUSTAFAA,

5 Plaintiff,

6 v.

7 D.K. SISTO et al,

8 Defendant.

Case Number: CV07-06488 CW

**CERTIFICATE OF SERVICE**

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
10 Court, Northern District of California.

11 That on December 15, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located  
14 in the Clerk's office.

15 Abdullah W. Mustafaa E24447  
16 CSP-Solano II  
17 California State Prison-Solano  
18 P.O. Box 4000  
19 Vacaville, CA 95696

20 Dated: December 15, 2008

21 Richard W. Wiekling, Clerk  
22 By: Sheilah Cahill, Deputy Clerk