

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

3 MICHAEL J. LANDI,

No. C 13-1208 SBA (PR)

4 Petitioner,

**ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS; AND
DENYING CERTIFICATE OF
APPEALABILITY**

5 v.

6 M. E. SPEARMAN, Acting Warden,

7 Respondent.
8 _____/

9 Petitioner, a state prisoner proceeding pro se, seeks a petition for a writ of habeas
10 corpus pursuant to 28 U.S.C. § 2254, challenging his state conviction. Respondent has
11 moved to dismiss the petition as successive under 28 U.S.C. § 2244(b). Dkt. 4. Petitioner
12 opposes the motion to dismiss. Respondent filed a reply to the opposition.

13 Having read and considered the papers filed in connection with this matter and being
14 fully informed, the Court hereby GRANTS Respondent's motion to dismiss for the reasons
15 set forth below.

16 **BACKGROUND**

17 In September 1995, Petitioner was sentenced in the Santa Clara County Superior
18 Court to forty-five years to life in state prison. Pet. at 2-3. He entered a no contest plea to
19 forcible lewd and lascivious acts on a child under age fourteen, and he admitted to a
20 sentencing enhancement alleging that he had two or more prior sex offense convictions. Id.

21 On November 20, 1996, the California Court of Appeal affirmed the judgment. Resp't
22 Ex. 1. On February 26, 1997, the California Supreme Court denied his petition for review.
23 Resp't Ex. 2.

24 In 1998 and 1999, Petitioner filed several state habeas petitions challenging his 1995
25 conviction, which were all denied. Resp't Exs. 3, 4.

26 On September 21, 1999, Petitioner filed his first federal habeas petition challenging
27 his 1995 conviction. Case No. C 99-4301 SBA (PR). This Court dismissed his first federal
28 petition with prejudice as untimely, and entered judgment for Respondent. Id. On March 11,

1 2002, the Ninth Circuit Court of Appeals affirmed the dismissal. Landi v. Hickman, No. 01-
2 15730, 32 Fed. Appx. 383 (9th Cir. 2002). On March 26, 2003, the United States Supreme
3 Court denied a petition for a writ of certiorari. Landi v. Hickman, 538 U.S. 924 (2003). On
4 December 7, 2007, this Court denied Petitioner's Motion for Relief from Judgment. Resp't
5 Exs. 5, 6.

6 In 2011 and 2012, Petitioner filed a second round of state habeas petitions challenging
7 his 1995 conviction in the Santa Clara County Superior Court, California Court of Appeal,
8 and California Supreme Court, all of which were denied. Pet. at 8; Resp't Exs. 7, 8.

9 On March 19, 2013, Petitioner filed the instant federal habeas petition, again
10 challenging his 1995 conviction.

11 DISCUSSION

12 A claim presented in a second or successive petition for a writ of habeas corpus
13 pursuant to 28 U.S.C. § 2254 must be dismissed if presented in a prior petition. See 28
14 U.S.C. § 2244(b)(1); Babbitt v. Woodford, 177 F.3d 744, 745-46 (9th Cir. 1999). Similarly,
15 if a claim was previously presented, then asserting a new factual basis for that claim in a
16 second or successive petition is not sufficient to prevent dismissal. See id. at 746 (ineffective
17 assistance claim based on counsel's alcohol abuse successive of claim that counsel failed to
18 present Post Traumatic Stress Disorder claim). As a consequence, a petitioner must obtain an
19 order from the court of appeals which authorizes the district court to consider any second or
20 successive petition before that petitioner can file such a petition. See 28 U.S.C.
21 § 2244(b)(3)(A). Without such an order, a district court must dismiss the successive petition,
22 including any new claims raised in that petition. See id. § 2244(b)(2).

23 Here, Respondent contends that the instant petition is successive because Petitioner
24 has filed a prior federal habeas petition, which challenged the same underlying state
25 conviction -- the 1995 conviction. Mot. to Dismiss at 3-4. As mentioned above, in his first
26 federal habeas action, Case No. C 99-4301 SBA (PR), this Court granted Respondent's
27 motion to dismiss the petition as untimely under 28 U.S.C. § 2244(d). Respondent contends
28 this Court has no jurisdiction to consider Petitioner's renewed application for relief because

1 Petitioner has made no showing that he obtained an order from the Ninth Circuit allowing
2 him to file a successive petition. Thus, Respondent asserts the petition must be dismissed as
3 successive under 28 U.S.C. § 2244(b).

4 In his opposition, Petitioner does not deny that he filed a previous federal habeas
5 petition, as shown by Respondent. Rather, Petitioner asks the Court to consider one of the
6 following options: (1) to hold his petition in abeyance while he seeks authorization from the
7 Ninth Circuit to file a second or successive petition; (2) to allow Petitioner to withdraw his
8 petition with leave to amend and/or refile his petition once he has obtained authorization
9 from the Ninth Circuit to file a second or successive petition; or (3) to apply the holding of
10 Hill v. Alaska, 297 F.3d 895, 897 (9th Cir. 2002), and find that his petition is not second or
11 successive. (Opp'n at 1.) In the alternative, Petitioner requests that in the event the Court
12 decides it has jurisdiction to hear the merits of his instant petition, that it apply the law of
13 McQuiggin v. Perkins, 133 S. Ct. 1924 (2013), which states that a claim of actual innocence
14 can overcome the bar to filing a second or successive petition. (Id. at 2.)

15 There is no dispute that Petitioner has not sought or obtained an order from the Ninth
16 Circuit authorizing him to file a second or successive habeas petition in federal court.
17 Section 2244(b)(3)(A) applies where, as here, the first petition was dismissed as untimely.
18 See McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009). Therefore, this Court must
19 dismiss the instant petition in its entirety under section 2244(b)(2), and for this reason, it
20 cannot consider options (1) and (2).

21 As to option (3), the Court finds unavailing Petitioner's reliance on the Ninth Circuit's
22 holding in Hill. Hill partly held that a prisoner's habeas corpus application is not successive
23 where it challenges the calculation of his release date if the prisoner did not have an
24 opportunity to challenge the State's conduct in a prior petition. 297 F.3d at 898. The claims
25 in the instant petition challenge Petitioner's 1995 conviction and not the calculation of his
26 release date; therefore, such a petition is successive.

27 Finally, Petitioner presents one last option -- that his claim of actual innocence can
28 overcome the bar to filing a second or successive petition. A federal court may hear the

1 merits of a successive, abusive, procedurally defaulted, or untimely claims if the failure to
2 hear the claims would constitute a miscarriage of justice. See McQuiggin v. Perkins, 133 S.
3 Ct. 1924, 1931-32 (2013) (holding that miscarriage of justice (actual innocence) showing
4 applies to claims filed after the AEDPA statute of limitations has run, as well as to
5 successive, abusive and procedurally defaulted claims); Lee v. Lampert, 653 F.3d 929, 931
6 (9th Cir. 2011) (en banc). However, the Supreme Court limits the "miscarriage of justice"
7 exception to habeas petitioners who can show that "a constitutional violation has probably
8 resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298,
9 327 (1995) (citing Murray v. Carrier, 477 U.S. at 496). Under this exception, a petitioner
10 may establish a procedural "gateway" permitting review of defaulted claims if he
11 demonstrates "actual innocence." Schlup, 513 U.S. at 316 & n.32. "[I]f a petitioner . . .
12 presents evidence of innocence so strong that a court cannot have confidence in the outcome
13 of the trial unless the court is also satisfied that the trial was free of non-harmless
14 constitutional error, the petitioner should be allowed to pass through the gateway and argue
15 the merits of his underlying claim." Schlup, 513 U.S. at 316. The required evidence must
16 create a colorable claim of actual innocence, that the petitioner is innocent of the charge for
17 which he is incarcerated, as opposed to legal innocence as a result of legal error. Id. at 321.

18 In addition, the Ninth Circuit has recognized that in Schlup the Supreme Court made
19 the actual innocence gateway available to a federal habeas petitioner who was convicted
20 following a jury trial, while in this case, Petitioner entered a no contest plea in state court
21 rather than proceeding to trial. See Smith v. Baldwin, 510 F.3d 1127, 1140 n.9 (9th Cir.
22 2007) (en banc). In Smith, the Ninth Circuit noted that: "We are aware of a potential
23 incongruity between the purpose of the actual innocence gateway announced in Schlup and
24 its application to cases involving guilty (or no contest) pleas." Id. (citing Bousley v. United
25 States, 523 U.S. 614, 629-36 (1998) (Scalia, J., dissenting)). The Ninth Circuit left the
26 question open and did not determine whether the Schlup actual innocence gateway always
27 applies to petitioners who plead guilty or no contest. Id. Therefore, this Court declines to
28 assume that the actual innocence gateway is available to Petitioner in the instant action,

1 whose conviction rests on a no contest plea. Instead, Petitioner may present his claims to the
2 Ninth Circuit, which is the proper forum for resolving such claims for purposes of 28 U.S.C.
3 § 2244(b)(3). As Respondent has pointed out, the only issue before this Court is whether
4 Petitioner has previously filed a federal habeas petition challenging the same judgment. The
5 parties agree that Petitioner has done so; therefore, the instant petition must be classified as a
6 successive petition. In addition, there is no disagreement between the parties that Petitioner
7 has not sought authorization from the Ninth Circuit to file the instant petition. See 28 U.S.C.
8 § 2244(b)(3)(A). Accordingly, this Court has no jurisdiction over the petition and it must be
9 DISMISSED in its entirety under section 2244(b).

10 CONCLUSION

11 For the foregoing reasons, Respondent's motion to dismiss the petition as successive
12 (dkt. 4) is GRANTED. The instant petition is DISMISSED as a successive petition pursuant
13 to § 2244(b).

14 No certificate of appealability is warranted in this case. See Rule 11(a) of the Rules
15 Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (requiring district court to rule on certificate
16 of appealability in same order that denies petition). Petitioner has not shown "that jurists of
17 reason would find it debatable whether the petition states a valid claim of the denial of a
18 constitutional right and that jurists of reason would find it debatable whether the district court
19 was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

20 The Clerk of the Court shall enter judgment, terminate all pending motions and close
21 the file.

22 This Order terminates Docket No. 4.

23 IT IS SO ORDERED.

24 DATED: 2/13/2014 _____ 
25 SAUNDRA BROWN ARMSTRONG
26 United States District Judge
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