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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN P. BUNYARD,
Petitioner,
v.
R. FISHER,
Respondent.

Case No. [15-cv-03785-PJH](#)

**ORDER DISMISSING PETITION AND
DENYING CERTIFICATE OF
APPEALABILITY**

Petitioner, a state prisoner, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the filing fee. The petition involves a conviction on August 22, 1995, in Santa Clara County Superior Court where petitioner was sentenced to 25 years to life in prison. Petitioner argues that his sentence violates the Eighth Amendment. However, court records indicate that petitioner filed a previous federal habeas petition regarding the same underlying conviction that was dismissed as untimely on March 25, 2004. *See Bunyard v. Knowles*, No. C 03-1280 PJH (PR). Petitioner filed two appeals to the Ninth Circuit that were denied. Thus, this is a successive petition.

“A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed....” 28

U.S.C. § 2244(b)(2). This is the case unless,

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

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(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2).

However, “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). Therefore, petitioner's application must be dismissed to its refiling upon obtaining authorization from the Ninth Circuit.

CONCLUSION

The petition is **DISMISSED**. Because reasonable jurists would not find the result here debatable, a certificate of appealability (“COA”) is **DENIED**. See *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000) (standard for COA). The clerk shall close the file.

IT IS SO ORDERED.

Dated: September 16, 2015



PHYLLIS J. HAMILTON
United States District Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN P. BUNYARD,
Plaintiff,
v.
R. FISHER,
Defendant.

Case No. [15-cv-03785-PJH](#)

CERTIFICATE OF SERVICE

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

That on September 17, 2015, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

John P. Bunyard ID: J-75189
P.O. Box 96
Chowchilla, CA 93610

Dated: September 17, 2015

Susan Y. Soong
Clerk, United States District Court

By: *Nichole Peric*
Nichole Peric, Deputy Clerk to the
Honorable PHYLLIS J. HAMILTON