

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

DAVID GORDON FLEMING,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:14-cv-00327-JAW
	)	
WARDEN, MAINE STATE PRISON,	)	
	)	
Respondent.	)	

**ORDER AFFIRMING RECOMMENDED DECISION  
OF THE MAGISTRATE JUDGE**

On August 15, 2014, David Gordon Fleming filed with this Court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that he is in custody in violation of the United States Constitution. *Pet. for Writ of Habeas Corpus* (ECF No. 1). On August 21, 2014, the Magistrate Judge issued a recommended decision in which he recommended that the Court dismiss the petition because it is a second or successive § 2254 petition and the record does not reflect that the First Circuit Court of Appeals has authorized this Court to consider the petition. *Recommended Decision on 28 U.S.C. § 2254 Pet.* (ECF No. 2). On September 2, 2014, Mr. Fleming objected to the Recommended Decision. *Objection to Report and Recommended Decision* (ECF No. 3). The primary ground for Mr. Fleming's objection is his assertion that the Magistrate Judge erred in stating that his earlier § 2254 petition barred his current § 2254 petition because, Mr. Fleming contends, the earlier § 2254 petition had been stayed. *Id.* at 1.

The Court reviewed Mr. Fleming's earlier § 2254 petition and the Court concludes that Mr. Fleming is wrong about the earlier-filed petition. Mr. Fleming filed a petition for writ of habeas corpus on July 5, 2005 in this Court under docket number 1:05-cv-00093-GZS. *Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus By a Person in State Custody* (ECF No. 2) (Docket No. 1:05-cv-00093-GZS). On February 1, 2006, the Magistrate Judge recommended that the motion to dismiss the petition of Jeffrey Merrill, the then Warden of the Maine State Prison, should be granted. *Recommended Decision on Mot. to Dismiss* (ECF No. 16). On February 23, 2006, the Court affirmed the Recommended Decision. *Order Affirming Recommended Decision of the Magistrate Judge* (ECF No. 17). On the same day, the Order was reduced to Judgment. *J.* (ECF No. 18). There was no appeal. The case was never stayed.

Thus, contrary to Mr. Fleming's memory, he did file a prior petition for writ of habeas corpus under 28 U.S.C. § 2254 and the Court never stayed that petition. Instead, the Court dismissed the petition and issued a final judgment against it. As such, the pending petition is a second or successive petition and must be dismissed for the reason set forth in the Magistrate Judge's Recommended Decision.

The Court **OVERRULES** David Gordon Fleming's Objection, **AFFIRMS** the Magistrate Judge's Recommended Decision, and **ORDERS** his Petition for Writ of Habeas Corpus **DISMISSED** (ECF No. 2). It is further **ORDERED** that no certificate of appealability should issue in the event the Petitioner files a notice of appeal

because there is no substantial showing of the denial of a constitutional right within the meaning of 28 U.S.C. § 2253(c)(2).

SO ORDERED.

/s/ John A. Woodcock, Jr.  
JOHN A. WOODCOCK, JR.  
CHIEF UNITED STATE DISTRICT JUDGE

Dated this 3rd day of September, 2014