

APPENDIX A

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

MAY 4 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE J. HERNANDEZ,

Petitioner-Appellant,

v.

M. ELIOT SPEARMAN,

Respondent-Appellee.

No. 18-15321

D.C. No.

1:17-cv-01625-AWI-JLT

Eastern District of California,
Fresno

ORDER

Before: BYBEE and BEA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

APPENDIX B .

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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 JOSE DE JESUS HERNANDEZ,

12 Petitioner,

13 v.

14 M. E. SPEARMAN,

15 Respondent.
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Case No. 1:17-cv-01625-JLT (HC)

FINDINGS AND RECOMMENDATION TO
DISMISS SUCCESSIVE PETITION FOR
WRIT OF HABEAS CORPUS

ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT JUDGE

[TWENTY-ONE DAY OBJECTION
DEADLINE]

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18 On December 1, 2017, Petitioner filed the instant petition for writ of habeas corpus in this
19 Court. Because the petition is successive, the Court will recommend it be **DISMISSED**.

20 **PROCEDURAL BACKGROUND**

21 On September 26, 2007, Petitioner was convicted in the Tulare County Superior Court of:
22 first degree felony murder with a robbery/burglary special circumstance; attempted murder of a
23 peace officer with a special allegation that the offense occurred while the officer was engaged in
24 the performance of his duties; four counts of second degree robbery with personal use of a
25 firearm; three counts of second degree commercial burglary; conspiracy to commit robbery;
26 unlawfully taking or driving a vehicle; and receiving a stolen vehicle. He is serving a sentence
27 of life without the possibility of parole.

28 The instant petition challenges the 2007 conviction and raises the following claims for

relief: 1) Ineffective assistance of counsel due to failure to raise claims on appeal; 2) Evidence was insufficient to support the conviction for first degree felony murder; 3) An ambiguous jury instruction on felony murder unconstitutionally relieved the state of its burden of proof of an element of the crime; 4) The evidence does not support a finding that the attempted murder is a reasonably foreseeable natural and probable consequence; 5) The trial court's denial to continue the trial violated Petitioner's due process rights and his right to prepare a defense for trial; and 6) The court imposed an illegal and excessive restitution fine.

The instant petition is not Petitioner's first federal petition. On February 25, 2010, Petitioner filed a federal petition for writ of habeas corpus in this Court challenging the same conviction. See Hernandez v. New Folsom State Prison Warden, Case No.: 1:10-cv-00391-LJO-JLT (HC). The District Court denied the petition on the merits on May 11, 2012. Petitioner appealed to the Ninth Circuit Court of Appeals on May 30, 2012, and the appellate court denied the appeal on July 25, 2013.

DISCUSSION

A federal court must dismiss a second or successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive petition raising a new ground unless the petitioner can show that 1) the claim rests on a new, retroactive, constitutional right or 2) the factual basis of the claim was not previously discoverable through due diligence, and these new facts establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court that decides whether a second or successive petition meets these requirements.

Section 2244 (b)(3)(A) provides: "Before 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." In other words, Petitioner must obtain leave from the Ninth Circuit before he can file a second or successive petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave

1 to file the petition because a district court lacks subject-matter jurisdiction over a second or
2 successive petition. Burton v. Stewart, 549 U.S. 147, 152 (2007); Cooper v. Calderon, 274 F.3d
3 1270, 1274 (9th Cir. 2001).

4 Because the current petition was filed after April 24, 1996, the provisions of the
5 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current
6 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has
7 obtained prior leave from the Ninth Circuit to file his successive petition attacking the
8 conviction. That being so, this Court has no jurisdiction to consider Petitioner's renewed
9 application for relief from that conviction under Section 2254 and must dismiss the petition. See
10 Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991.

11 ORDER

12 Accordingly, the Clerk of Court is DIRECTED to assign a District Judge to this case.

13 RECOMMENDATION

14 For the foregoing reasons, the Court RECOMMENDS that the petition be DISMISSED
15 as successive.

16 This Findings and Recommendation is submitted to the United States District Court
17 Judge assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and
18 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of
19 California. Within twenty-one days after being served with a copy, Petitioner may file written
20 objections with the Court. Such a document should be captioned "Objections to Magistrate
21 Judge's Findings and Recommendation." The Court will then review the Magistrate Judge's
22 ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections
23 within the specified time may waive the right to appeal the District Court's order. Martínez v.
24 Ylst, 951 F.2d 1153 (9th Cir. 1991).

25 IT IS SO ORDERED.
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27 Dated: December 11, 2017

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 JOSE DE JESUS HERNANDEZ,

12 Petitioner,

13
14 v.
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16 M. E. SPEARMAN,

17 Respondent.
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No. 1:17-cv-01625-AWI-JLT (HC)

**ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS (Doc. No. 7)**

**ORDER DISMISSING SUCCESSIVE
PETITION FOR WRIT OF HABEAS
CORPUS**

**ORDER DIRECTING CLERK OF COURT
TO ENTER JUDGMENT AND CLOSE
CASE**

**ORDER DECLINING TO ISSUE
CERTIFICATE OF APPEALABILITY**

20 Petitioner is a state prisoner proceeding in propria persona with a petition for writ of
21 habeas corpus pursuant to 28 U.S.C. § 2254. On December 12, 2017, the Magistrate Judge
22 assigned to the case issued Findings and Recommendation to dismiss the petition as successive.
23 (Doc. No. 7.) This Findings and Recommendation was served upon all parties and contained
24 notice that any objections were to be filed within twenty-one days from the date of service of that
25 order. On January 2, 2018, Petitioner filed objections to the Magistrate Judge's Findings and
26 Recommendations. (Doc. No. 8.)

27 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), the Court has conducted a
28 de novo review of the case. Having carefully reviewed the entire file, including Petitioner's

1 objections, the Court concludes that the Magistrate Judge's Findings and Recommendation is
2 supported by the record and proper analysis. Petitioner's objections present no grounds for
3 questioning the Magistrate Judge's analysis.

4 In addition, the Court declines to issue a certificate of appealability. A state prisoner
5 seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of
6 his petition, and an appeal is only allowed in certain circumstances. *Miller-El v. Cockrell*, 537
7 U.S. 322, 335-336 (2003). The controlling statute in determining whether to issue a certificate of
8 appealability is 28 U.S.C. § 2253, which provides as follows:

9 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district
10 judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit
in which the proceeding is held.

11 (b) There shall be no right of appeal from a final order in a proceeding to test the
12 validity of a warrant to remove to another district or place for commitment or trial a person
13 charged with a criminal offense against the United States, or to test the validity of such person's
detention pending removal proceedings.

14 (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may
not be taken to the court of appeals from—

15 (A) the final order in a habeas corpus proceeding in which the detention
16 complained of arises out of process issued by a State court; or

17 (B) the final order in a proceeding under section 2255.

18 (2) A certificate of appealability may issue under paragraph (1) only if the applicant has
made a substantial showing of the denial of a constitutional right.

19 (3) The certificate of appealability under paragraph (1) shall indicate which specific issue
20 or issues satisfy the showing required by paragraph (2).

21 If a court denies a petitioner's petition, the court may only issue a certificate of
22 appealability when a petitioner makes a substantial showing of the denial of a constitutional right.
23 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish that
24 "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have
25 been resolved in a different manner or that the issues presented were 'adequate to deserve
26 encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting
27 *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

28 In the present case, the Court finds that Petitioner has not made the required substantial

1 showing of the denial of a constitutional right to justify the issuance of a certificate of
2 appealability. Reasonable jurists would not find the Court's determination that Petitioner is not
3 entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to
4 proceed further. Thus, the Court DECLINES to issue a certificate of appealability.

5 Accordingly, the Court orders as follows:

- 6 1. The Findings and Recommendations, filed December 12, 2017 (Doc. No. 7), is
7 ADOPTED IN FULL;
- 8 2. The petition for writ of habeas corpus is DISMISSED as successive;
- 9 3. The Clerk of Court is DIRECTED to ENTER JUDGMENT and close the file; and,
- 10 4. The Court DECLINES to issue a certificate of appealability.

11 This order terminates the action in its entirety.

12 IT IS SO ORDERED.

13 Dated: February 6, 2018

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15 SENIOR DISTRICT JUDGE
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**Additional material
from this filing is
available in the
Clerk's Office.**