

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 14 2018

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

TRAVIS MICHAEL ORTIZ,

Petitioner-Appellant,

v.

DAVID BAUGHMAN, Warden and
KEVIN SEARS,

Respondents-Appellees.

No. 18-16193

D.C. No. 2:18-cv-00255-JAM-AC
Eastern District of California,
Sacramento

ORDER

Before: TROTT and WARDLAW, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because the underlying 28 U.S.C. § 2254 petition fails to state any federal constitutional claims debatable among jurists of reason. *See* 28 U.S.C. § 2253(c)(2)-(3); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (“When ... the district court denies relief on procedural grounds, the petitioner seeking a COA must show both ‘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.’”) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Appellant’s application for authorization to file a second or successive habeas petition remains pending in Appeal No. 18-72641.

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ORDER

*an Emergency appeal -
an extraordinary writ
2254 case*

Before: SILVERMAN and CALLAHAN, Circuit Judges.

Appellant's motion for reconsideration and other post-judgment requests
(Docket Entry Nos. 33, 34, 35, 36 and 37) are denied. See 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

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3 case law
4 Morrow VS. Superior Court
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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 TRAVIS MICHAEL ORTIZ,

12 Petitioner,

13 v.

14 DAVID BAUGHMAN,

15 Respondent.
16

District Court No. 2:18-cv-00255 JAM AC P

Ninth Circuit Court of Appeals No. 18-16193

ORDER

17 The Ninth Circuit Court of Appeals has remanded this matter to this court for the limited
18 purpose of determining whether a certificate of appealability (COA) should issue.

19 On April 27, 2018, this court dismissed without prejudice petitioner's application for a
20 writ of habeas corpus pursuant to 28 U.S.C. § 2254. See ECF Nos. 7, 15-6. This court found the
21 application successive and that petitioner had not obtained authorization from the Court of
22 Appeals for this court to consider the merits of the application. See 28 U.S.C. § 2244(b)(3). Prior
23 authorization from the appellate court is a jurisdictional prerequisite for this court's review of the
24 merits of a successive petition. See Burton v. Stewart, 549 U.S. 147, 152 (2007); Cooper v.
25 Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001) (once district court has recognized a petition as
26 second or successive pursuant to § 2244(b), it lacks jurisdiction to consider the merits).

27 In dismissing this action, this court did not then address whether a COA should issue. No
28 appeal may be taken from a final district court order in a Section 2254 proceeding if a COA has

1 not issued. See 28 U.S.C. § 2253(c); see also Fed. R. App. P. 22(b)(1). A COA may issue “only
2 if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C.
3 § 2253(c)(2). “[W]hen the district court denies a habeas petition on procedural grounds without
4 reaching the prisoner’s underlying constitutional claim, a COA should issue (and an appeal of the
5 district court’s order may be taken) if the prisoner shows, at least, that jurists of reason would find
6 it debatable whether the petition states a valid claim of the denial of a constitutional right; and
7 that jurists of reason would find it debatable whether the district court was correct in its
8 procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 478 (2000).

9 In the instant case, this court did not reach the merits of petitioner’s claims because the
10 application was denied for lack of jurisdiction. Reasonable jurists would not debate whether
11 a successive application for habeas relief may be reviewed on the merits by this district court
12 without prior authorization from the Ninth Circuit Court of Appeals. See 28 U.S.C. § 2244(b);
13 Felker v. Turpin, 518 U.S. 651, 656-57 (1996). Therefore, this court declines to issue a certificate
14 of appealability.

15 Accordingly, IT IS HEREBY ORDERED that:

16 1. This court declines to issue the certificate of appealability referenced in 28 U.S.C. §
17 2253(c); and

18 2. The Clerk of Court shall confirm that the record in this case has been transmitted to the
19 Court of Appeals, see ECF No. 25, and ECF No. 31 at 2.

20 DATED: July 9, 2018

21 /s/ John A. Mendez
22 UNITED STATES DISTRICT COURT JUDGE
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Any pending motions are denied as moot.

DENIED.

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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 TRAVIS MICHAEL ORTIZ,

12 Petitioner,

13 v.

14 DAVID BAUGHMAN, Warden,

15 Respondent.
16

No. 2:18-cv-00255 AC P

ORDER and

FINDINGS AND RECOMMENDATIONS

17 Petitioner, a state prisoner proceeding pro se, has filed a petition for writ of habeas corpus
18 pursuant to 28 U.S.C. § 2254. See ECF No. 1. Petitioner has not yet submitted an application to
19 proceed in forma pauperis or pay the filing fee. See ECF No. 4. Petitioner has sought to confirm
20 the court's receipt of his consent to the jurisdiction of the undersigned magistrate judge, see ECF
21 Nos. 3 (consent) & 6 (letter confirming consent),¹ and filed a motion for appointment of counsel,
22 see ECF No. 5. However, because the instant petition for writ of habeas corpus is the second
23 filed by petitioner challenging his 2012 conviction and sentence in the Butte County Superior
24 Court, this action must be dismissed without prejudice to its re-filing should petitioner obtain
25 authorization from the Ninth Circuit Court of Appeals.

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27 ¹ Notwithstanding petitioner's consent to proceed before the undersigned magistrate judge for all
28 purposes, under 28 U.S.C. § 636(c), the recommended dismissal of this case is directed to the
assigned district judge pursuant 28 U.S.C. § 636(b)(1). See Williams v. King, 875 F.3d 500 (9th
Cir. 2017).

1 The court's records reveal that petitioner previously filed a petition for writ of habeas
2 corpus attacking the same conviction and sentence challenged in the instant case.² The previous
3 petition was filed on March 30, 2016, and denied on the merits on March 20, 2018. See Ortiz v.
4 Baughman, Case No. 2:16-cv-00659 KJM CDK P. Before petitioner can proceed with the instant
5 petition, he must move in, and obtain from, the Ninth Circuit Court of Appeals, an order
6 authorizing the district court to consider the merits of his successive petition. See 28 U.S.C.
7 § 2244(b)(3). Absent such authorization, the instant petition must be dismissed without
8 prejudice. Id.

9 Accordingly, IT IS HEREBY ORDERED that:

- 10 1. This court's order filed February 22, 2018, ECF No. 4, is vacated as unnecessary;
- 11 2. Petitioner's request for appointment of counsel, ECF No. 5, is denied as moot; and
- 12 3. The Clerk of Court is directed to randomly assign a district judge to this action.

13 Further, IT IS HEREBY RECOMMENDED that this action be dismissed without
14 prejudice because premised on an unauthorized successive petition for writ of habeas corpus
15 under 28 U.S.C. § 2254.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 after being served with these findings and recommendations, petitioner may file written
19 objections with the court. The document should be captioned "Objections to Magistrate Judge's
20 Findings and Recommendations." Petitioner is advised that failure to file objections within the
21 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
22 F.2d 1153 (9th Cir. 1991).

23 DATED: March 22, 2018

24 
25 ALLISON CLAIRE
26 UNITED STATES MAGISTRATE JUDGE

27 ^② A court may take judicial notice of its own records and the records of other courts. See MGIC
28 Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d
118, 119 (9th Cir. 1980).