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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
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11 LEON SHELBY BROWN, JR.,

12 Petitioner,

13 v.

14 C. NOLL, Warden, et al.

15 Respondents.
16

No. EDCV 09-2103-AHM (AGR)

OPINION AND ORDER ON PETITION
FOR WRIT OF HABEAS CORPUS

17 On October 20, 2009, Petitioner Leon Shelby Brown, Jr., proceeding pro se, filed
18 a Petition for Writ of Habeas Corpus By a Person in State Custody ("Petition") pursuant
19 to 28 U.S.C. § 2254 in the Southern District of California. By order filed November 12,
20 2009, the action was transferred to the Central District of California.

21 **I.**

22 **PROCEDURAL HISTORY**

23 Pursuant to Fed. R. Evid. 201, this Court takes judicial notice of the records in a
24 prior federal habeas corpus action brought by Petitioner: *Leon Shelby Brown, Jr. v. G.J.*
25 *Giurbino*, EDCV 01-785 AHM (JWJ) ("*Brown I*").

26 According to the Petition, a jury in 1998 found Petitioner guilty of second-degree
27 commercial burglary and petty theft with a prior. (Petition at 1-2; *Brown I*, Report and
28 Recommendation (R&R) at 1.) The trial court sentenced Petitioner to state prison for 25

1 years to life. (Petition at 1; *Brown I*, R&R at 2.) On September 30, 1999, the California
2 Court of Appeal affirmed the conviction and remanded for resentencing.¹ (*Id.*) On
3 December 21, 1999, the California Supreme Court denied the petition for review.
4 (Petition at 2; *Brown I*, R&R at 2.) On August 29, 2001, the California Supreme Court
5 denied a state habeas petition. (*Id.* at 2.)

6 In *Brown I*, Petitioner filed a petition for writ of habeas corpus by a person in state
7 custody on October 16, 2001. (Dkt. No. 1.) Petitioner challenged his conviction and
8 sentence based on four grounds: (1) trial judge failed to exercise his discretion to strike
9 priors and Petitioner’s sentence was cruel and unusual in violation of the Eighth
10 Amendment; (2) application of the Three Strikes law to pre-1994 priors violated the Ex
11 Post Facto Clause; and (3-4) ineffective assistance of trial counsel. (*Brown 1*, R&R at
12 2-3.) On February 18, 2004, this Court entered an Order Adopting Report and
13 Recommendation of United States Magistrate Judge and a Judgment denying the
14 petition with prejudice. (Dkt. Nos. 29-30.) On June 14, 2004, Petitioner filed a Notice of
15 Appeal. (Dkt. No. 32.) On June 21, 2004, this Court denied Petitioner’s request for a
16 certificate of appealability. (Dkt. No. 34.) On September 14, 2004, the Ninth Circuit
17 denied Petitioner’s request for certificate of appealability. (Dkt. No. 38.)

18 On December 26, 2006, the Ninth Circuit denied Petitioner’s application for
19 authorization to file a second or successive petition. (Dkt. No. 40.)

20 II.

21 DISCUSSION

22 The Petition was filed after enactment of the Antiterrorism and Effective Death
23 Penalty Act of 1996 (“AEDPA”). Therefore, the Court applies the AEDPA in reviewing
24 the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481
25 (1997).

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28 ¹ On remand, the trial court resentenced Petitioner to 25 years to life and struck a one-
year enhancement. (*Brown I*, R&R at 2.)

1 The AEDPA provides, in pertinent part, that: “Before a second or successive
2 application permitted by this section is filed in the district court, the applicant shall move
3 in the appropriate court of appeals for an order authorizing the district court to consider
4 the application.” 28 U.S.C. § 2244(b)(3)(A). A district court does not have jurisdiction to
5 consider a “second or successive” petition absent authorization from the Ninth Circuit.
6 *Burton v. Stewart*, 549 U.S. 147, 152, 127 S. Ct. 793, 166 L. Ed. 2d 628 (2007); *Cooper*
7 *v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001) (“When the AEDPA is in play, the
8 district court may not, in the absence of proper authorization from the court of appeals,
9 consider a second or successive habeas application.”) (citation omitted and quotation
10 marks omitted).

11 Here, the Petition is a second or successive petition that challenges the same
12 conviction and sentence imposed by the same judgment of the state court as in *Brown*
13 *I*. (Petition at 1-2 & Attachment.) The Petition seeks “to vacate his unauthorized
14 sentence.” (Petition, Attachment at 1.) Petitioner argues that the trial court should
15 strike a 1989 prior as constitutionally invalid and/or in furtherance of justice. (*Id.* at 5-7.)
16 The Petition is considered a successive petition because the district court entered
17 judgment and denied the petition on the merits in *Brown I*. See *Beaty v. Schriro*, 554
18 F.3d 780 (9th Cir.), *cert. denied*, 175 L. Ed. 2d 50 (2009). The Ninth Circuit has
19 previously denied an application for authorization to file a second or successive petition.
20 (*Brown I*, Dkt. No. 40.)

21 It plainly appears from the face of the Petition that Petitioner has not received
22 authorization from the Ninth Circuit Court of Appeals to file a second or successive
23 petition. This Court must, therefore, dismiss the Petition as a successive petition for
24 which it lacks jurisdiction under 28 U.S.C. § 2244(b)(3). See *Burton*, 549 U.S. at 152.

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1 Rule 4 of the Rules Governing Section 2254 Cases in the United States Courts
2 provides that “[i]f it plainly appears from the face of the petition and any attached
3 exhibits that the petitioner is not entitled to relief in the district court, the judge must
4 dismiss the petition and direct the clerk to notify the petitioner.” Here, summary
5 dismissal is warranted.

6 **ORDER**

7 IT IS HEREBY ORDERED that Judgment be entered summarily dismissing the
8 habeas petition and action for lack of subject matter jurisdiction.

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10 Date: November 19, 2009

A handwritten signature in black ink, appearing to read "A. Howard Matz", is written over a light gray rectangular background.

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12 A. HOWARD MATZ
13 UNITED STATES DISTRICT JUDGE
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