## 1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 EASTERN DISTRICT OF CALIFORNIA 10 FREDRICK R. BROWN, Case No. 1:16-cv-00073- DAD-EPG-HC 11 12 Petitioner, FINDINGS AND RECOMMENDATION RECOMMENDING DISMISSAL OF 13 v. PETITION FOR WRIT OF HABEAS **CORPUS** 14 JEROME PRICE, 15 Respondent. 16 Petitioner Fredrick R. Brown is a state prisoner proceeding pro se with a petition for writ 17 of habeas corpus pursuant to 28 U.S.C. § 2254. In the instant petition, Petitioner challenges a 18 1999 criminal judgment in the Kern County Superior Court on the basis that the sentence 19 imposed was unlawfully enhanced by his prior 1987 conviction. As Petitioner has previously 20 sought federal habeas relief with respect to the challenged conviction and sentence, the Court 21 finds that dismissal of the petition is warranted pursuant to 28 U.S.C. § 2244(b) because it is an 22

unauthorized successive petition.

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I. BACKGROUND

On January 5, 2016, Petitioner filed the instant petition for writ of habeas corpus in the United States District Court for the Central District of California. (ECF No. 1). On January 13, 2016, the matter was transferred to this Court. (ECF No. 4). On January 27, 2016, the Court

ordered Petitioner to show cause why the instant petition should not be dismissed for lack of jurisdiction. (ECF No. 9). The Court had interpreted the instant petition as challenging Petitioner's 1987 conviction in the Kern County Superior Court of attempted burglary, and it appeared to the Court that Petitioner was no longer in custody pursuant to the 1987 conviction.

On February 25, 2016, Petitioner filed a response to the order to show cause. (ECF No. 12). Petitioner argues that the Court should construe the instant petition as asserting a challenge to the 1999 Kern County Superior Court judgment (for which he is currently in custody) that was enhanced by his 1987 conviction, in violation of the terms of his plea agreement. (<u>Id.</u> at 2).<sup>1</sup>

## II.

## **DISCUSSION**

Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a habeas petition and allows a district court to dismiss a petition before the respondent is ordered to file a response, if it "plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." 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, a 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

<sup>&</sup>lt;sup>1</sup> Page numbers refer to the ECF page numbers stamped at the top of the page.

dismiss any second or successive petition unless the Court of Appeals has given a petitioner leave to file the petition because a district court lacks subject-matter jurisdiction over a second or successive petition. <u>Burton v. Stewart</u>, 549 U.S. 147, 157 (2007).

Upon review of the petition and Petitioner's response to the order to show cause, it appears the instant federal habeas petition challenges the 38-years-to-life sentence imposed in 1999 by the Kern County Superior Court. (ECF No. 1 at 13; ECF No. 12 at 2). Petitioner previously sought federal habeas relief in this Court with respect to the same judgment. Petition at 1, <u>Brown v. Kane</u>, No. 1:06-cv-00804-SMS (E.D. Cal. June 23, 2006), ECF No. 1.<sup>2</sup> This previous petition was dismissed as untimely. <u>Brown v. Kane</u>, No. 1:06-cv-00804-SMS, 2008 WL 686120 (E.D. Cal. Mar. 13, 2008). Petitioner appealed the dismissal to the Ninth Circuit Court of Appeals, and the Ninth Circuit denied the request for a certificate of appealability. Order, <u>Brown v. Kane</u>, No. 08-15742 (9th Cir. Jan. 15, 2009).

The Court finds that the instant petition is "second or successive" under § 2244(b). <u>See McNabb v. Yates</u>, 576 F.3d 1028, 1030 (9th Cir.2009) (holding "dismissal of a first habeas petition for untimeliness presents a 'permanent and incurable' bar to federal review of the underlying claims," and thus renders subsequent petitions "second or successive"). Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file his successive petition. Therefore, this Court has no jurisdiction to consider Petitioner's renewed application for relief under 28 U.S.C. § 2254 and must dismiss the petition. <u>See Burton</u>, 549 U.S. at 157.

III.

## RECOMMENDATION

Accordingly, IT IS HEREBY RECOMMENDED that the petition for writ of habeas corpus be DISMISSED as successive.

This Findings and Recommendation is submitted to the assigned United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within

<sup>&</sup>lt;sup>2</sup> The Court may take judicial notice of its own records in other cases. <u>United States v. Wilson</u>, 631 F.2d 118, 119 (9th Cir. 1980).

THIRTY (30) days after service of the Findings and Recommendation, Petitioner may file written objections with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." The assigned District Judge will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). Petitioner is advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing <u>Baxter v. Sullivan</u>, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **March 30, 2016** 

UNITED STATES MAGISTRATE JUDGE