

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FREDRICK R. BROWN,
Petitioner,
v.
JEROME PRICE,
Respondent.

Case No. 1:16-cv-00073- DAD-EPG-HC
FINDINGS AND RECOMMENDATION
RECOMMENDING DISMISSAL OF
PETITION FOR WRIT OF HABEAS
CORPUS

Petitioner Fredrick R. Brown is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In the instant petition, Petitioner challenges a 1999 criminal judgment in the Kern County Superior Court on the basis that the sentence imposed was unlawfully enhanced by his prior 1987 conviction. As Petitioner has previously sought federal habeas relief with respect to the challenged conviction and sentence, the Court finds that dismissal of the petition is warranted pursuant to 28 U.S.C. § 2244(b) because it is an unauthorized successive petition.

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

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

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

9 II.

10 DISCUSSION

11 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a
12 habeas petition and allows a district court to dismiss a petition before the respondent is ordered
13 to file a response, if it “plainly appears from the petition and any attached exhibits that the
14 petitioner is not entitled to relief in the district court.” A federal court must dismiss a second or
15 successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The
16 court must also dismiss a second or successive petition raising a new ground unless the petitioner
17 can show that (1) the claim rests on a new, retroactive, constitutional right, or (2) the factual
18 basis of the claim was not previously discoverable through due diligence, and these new facts
19 establish by clear and convincing evidence that but for the constitutional error, no reasonable
20 factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C. §
21 2244(b)(2)(A)-(B). However, it is not the district court that decides whether a second or
22 successive petition meets these requirements.

23 Section 2244(b)(3)(A) provides: “Before a second or successive application permitted by
24 this section is filed in the district court, the applicant shall move in the appropriate court of
25 appeals for an order authorizing the district court to consider the application.” In other words, a
26 petitioner must obtain leave from the Ninth Circuit before he can file a second or successive
27 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must

28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 **THIRTY (30) days** after service of the Findings and Recommendation, Petitioner may file
2 written objections with the Court and serve a copy on all parties. Such a document should be
3 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” The assigned
4 District Judge will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. §
5 636(b)(1)(C). Petitioner is advised that failure to file objections within the specified time may
6 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014)
7 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

8
9 IT IS SO ORDERED.

10 Dated: March 30, 2016

11 /s/ Eric P. Gray
12 UNITED STATES MAGISTRATE JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28