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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TERRENCE BROWNLEE,
Petitioner,

v.

R. NACKLEY,
Respondent.

Case No. 1:16-cv-00125 MJS (HC)

**FINDINGS AND RECOMMENDATION TO
DISMISS SUCCESSIVE PETITION FOR
WRIT OF HABEAS CORPUS PURSUANT
TO 28 U.S.C. § 2244(b)**

**ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT COURT JUDGE TO
THE PRESENT MATTER**

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus under 28 U.S.C. § 2254.

In the petition filed on January 27, 2016, Petitioner challenges an August 4, 1980 conviction in the Superior Court of California, County of Fresno for murder. Petitioner was sentenced to an indeterminate state prison term of seventeen (17) years to life.

A review of the Court's dockets and files shows Petitioner has previously sought habeas relief with respect to this conviction. In case number 1:01-cv-06120-OWW-SMS (HC), Petitioner challenged the same underlying conviction. On August 8, 2002, the

1 petition was denied as untimely.¹ See Brownlee v. Ayers, E.D. Cal. Case No. 1:01-cv-
2 06120-OWW-SMS (HC), ECF Nos. 25, 29. The Court's docket reflects that Petitioner
3 has additionally filed petitions with the following cases: 1:01-cv-06120-OWW-SMS; 1:05-
4 cv-00949-OWW-SMS; 1:06-cv-00320-OWW-SMS; 1:09-cv-00765-OWW-SMS; 2:10-cv-
5 00925-LKK-KJM; 2:10-cv-03478-GGH; 1:14-01990-LJO-SAB; 2:14-cv-01249-KJM-KJN;
6 and 1:15-cv-01610-DAD-LJT. Those petitions were denied as second or successive
7 petitions.

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9 **I. DISCUSSION**

10 A court must dismiss a second or successive petition that raises the same
11 grounds as a prior petition. 28 U.S.C. § 2244(b)(1). A court must also dismiss a second
12 or successive petition raising a new ground unless the petitioner can show that 1) the
13 claim rests on a new constitutional right, made retroactive by the United States Supreme
14 Court or 2) the factual basis of the claim was not previously discoverable through due
15 diligence, and these new facts establish by clear and convincing evidence that but for
16 the constitutional error, no reasonable factfinder would have found the applicant guilty of
17 the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court
18 that decides whether a second or successive petition meets these requirements; the
19 Petitioner must first file a motion with the appropriate court of appeals to be authorized to
20 file a second or successive petition with the district court.

21 Section 2244 (b)(3)(A) provides: "Before a second or successive application
22 permitted by this section is filed in the district court, the applicant shall move in the
23 appropriate court of appeals for an order authorizing the district court to consider the
24 application." In other words, Petitioner must obtain leave from the Ninth Circuit before he
25 can file a second or successive petition in district court. See Felker v. Turpin, 518 U.S.

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¹ In McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009), the Ninth Circuit held that dismissal of
28 a habeas petition for failure to comply with the AEDPA statute of limitations renders subsequent petitions
challenging the same conviction successive.

1 651, 656-657 (1996). This Court must dismiss any second or successive petition unless
2 the Court of Appeals has given Petitioner leave to file the petition because a district court
3 lacks subject-matter jurisdiction over a second or successive petition. Greenawalt v.
4 Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997).

5 Because the current petition was filed after April 24, 1996, the provisions of the
6 Antiterrorism and Effective Death Penalty Act of 1996 apply to Petitioner's current
7 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that
8 he has obtained prior leave from the Ninth Circuit to file his successive petition attacking
9 the conviction. That being so, this Court has no jurisdiction to consider Petitioner's
10 renewed application for relief under Section 2254 and must dismiss the petition. See
11 Greenawalt, 105 F.3d at 1277. If Petitioner desires to proceed in bringing this petition for
12 writ of habeas corpus, he must file for leave to do so with the Ninth Circuit. See 28
13 U.S.C. § 2244(b)(3).

14 15 **II. ORDER AND RECOMMENDATION**

16 The Court RECOMMENDS that the petition for writ of habeas corpus be
17 DISMISSED as successive. Further, the Court ORDERS the Clerk of Court to assign a
18 District Court judge to the instant matter.

19 These findings and recommendations are submitted to the United States
20 District Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636
21 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,
22 Eastern District of California. Within thirty (30) days after being served with a copy, any
23 party may file written objections with the Court and serve a copy on all parties. Such a
24 document should be captioned "Objections to Magistrate Judge's Findings and
25 Recommendations." Replies to the objections shall be served and filed within fourteen
26 (14) days (plus three days if served by mail) after service of the objections. The Court
27 will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c).

28 The parties are advised that failure to file objections within the specified time may

1 waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834,
2 839 (9th Cir. 2014).

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4 IT IS SO ORDERED.

5 Dated: February 1, 2016

/s/ Michael J. Seng
6 UNITED STATES MAGISTRATE JUDGE

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