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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

STEPHEN FEGAN,	)	Case No.: 1:14-cv-00967-JLT
Plaintiff,	)	
v.	)	FINDINGS AND RECOMMENDATIONS TO
	)	DISMISS PETITION FOR WRIT OF HABEAS
BRAZELTON,	)	CORPUS AS SECOND AND SUCCESSIVE
Defendant.	)	
	)	ORDER DIRECTING THAT OBJECTIONS BE
	)	FILED WITHIN TWENTY-ONE DAYS
	)	
	)	ORDER DIRECTING CLERK OF THE COURT TO
	)	ASSIGN DISTRICT JUDGE TO CASE

Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

**PROCEDURAL HISTORY**

The instant petition was filed on June 20, 2014, challenging a 1995 conviction in the Merced County Superior Court resulting in two sentences of life without the possibility of parole. (Doc. 1). In the course of conducting a preliminary screening of the petition, it has come to the Court’s attention that Petitioner has previously filed numerous federal habeas petitions challenging this same conviction.

A review of the Court’s own docket reflects that Petitioner has previously filed in this Court petitions challenging his 1995 conviction, as follows: case no. 1:99-cv-6427-OWW-LJO (merits denial); case no. 1:06-cv-00531-OWW-DLB (dismissed as successive); case no. 1:08-cv-01140-DLB

1 (dismissed as successive); case no. 1:08-cv-1373-JLT (dismissed as untimely); case no. 1:10-cv-  
2 01690-AWI-JLT (dismissing coram nobis petition and noting successive nature of challenge); 1:11-  
3 cv-01863-LJO-JLT (dismissed as successive).

## 4 DISCUSSION

### 5 A. Preliminary Review of Petition.

6 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition  
7 if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is  
8 not entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases. The  
9 Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas  
10 corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to dismiss, or after  
11 an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9<sup>th</sup> Cir.2001).

### 12 B. Successive Petitions.

13 A federal court must dismiss a second or successive petition that raises the same grounds as a  
14 prior petition. 28 U.S.C. § 2244(b)(1). The Court must also dismiss a second or successive petition  
15 raising a *new ground* unless the petitioner can show that 1) the claim rests on a new, retroactive,  
16 constitutional right or 2) the factual basis of the claim was not previously discoverable through due  
17 diligence, and these new facts establish by clear and convincing evidence that but for the constitutional  
18 error, no reasonable fact-finder would have found the applicant guilty of the underlying offense. 28  
19 U.S.C. § 2244(b)(2)(A)-(B).

20 However, it is not the district court that decides whether a second or successive petition meets  
21 these requirements that allow a petitioner to file a second or successive petition, but rather the Ninth  
22 Circuit. Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this  
23 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an  
24 order authorizing the district court to consider the application." In other words, Petitioner must obtain  
25 leave from the Ninth Circuit before he can file a second or successive petition in district court. See  
26 Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive  
27 petition unless the Court of Appeals has given Petitioner leave to file the petition because a district  
28 court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United States, 129

1 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997), *cert. denied*,  
2 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

3 Because the current petition was filed after April 24, 1996, the provisions of the Antiterrorism  
4 and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. Lindh v.  
5 Murphy, 521 U.S. 320, 327 (1997). It is abundantly clear from the chronology cited above that  
6 Petitioner has previously challenged his 1995 conviction in the Merced County Superior Court by  
7 filing multiple habeas petitions in this Court, dating back to 1999. However, Petitioner makes no  
8 showing that he has obtained leave from the Ninth Circuit to file this successive petition attacking that  
9 same conviction. That being so, this Court has no jurisdiction to consider Petitioner's renewed  
10 application for relief from that conviction under § 2254 and must dismiss the petition. See  
11 Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991. If Petitioner desires to proceed in bringing this  
12 petition for writ of habeas corpus, he must first file for leave to do so with the Ninth Circuit. See 28  
13 U.S.C. § 2244 (b)(3).

#### 14 **ORDER**

15 For the foregoing reasons, the Clerk of the Court is DIRECTED to assign a United States  
16 District judge to this case.

#### 17 **RECOMMENDATION**

18 Accordingly, the Court RECOMMENDS that the Petition for Writ of Habeas Corpus be  
19 DISMISSED as a second and successive petition.

20 This Findings and Recommendation is submitted to the United States District Court Judge  
21 assigned to the case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
22 Rules of Practice for the United States District Court, Eastern District of California. Within twenty-one  
23 (21) days after being served with a copy of this Findings and Recommendation, any party may file  
24 written objections with the Court and serve a copy on all parties. Such a document should be captioned  
25 "Objections to Magistrate Judge's Findings and Recommendation." Replies to the Objections shall be  
26 served and filed within ten (10) court days (plus three days if served by mail) after service of the  
27 Objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636  
28

1 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the  
2 right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

3  
4 IT IS SO ORDERED.

5 Dated: July 2, 2014

/s/ Jennifer L. Thurston  
6 UNITED STATES MAGISTRATE JUDGE