<u>1</u> 2 3 4 5 6 7 IN THE UNITED STATES DISTRICT COURT 8 FOR THE EASTERN DISTRICT OF CALIFORNIA 9 10 Case No. 1:16-cv-00085 MJS (HC) JEROME LAMAR GENTERY, 11 FINDINGS AND RECOMMENDATION TO DISMISS SUCCESSIVE PETITION Petitioner. 12 WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2244(b) ٧. 13 ORDER DIRECTING CLERK OF COURT 14 TO ASSIGN DISTRICT COURT JUDGE TO THE PRESENT MATTER STU SHERMAN, Warden, 15 Respondent. 16 17 18 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas 19 corpus under 28 U.S.C. § 2254. 20 In the petition filed on January 14, 2016, Petitioner challenges a sentence 21 imposed in the Kern County Superior Court on July 23, 1997 for murder and attempted 22 murder with great bodily injury and firearm enhancements. (Pet., ECF No. 1 at 1.) 23 Petitioner was sentenced to an indeterminate state prison term of sixty-one (61) years 24 and four months to life. In the petition, Petitioner challenges his convictions, alleging that 25 he suffered violations of his constitutional rights in the course of the trial and appellate 26 proceedings related to his commitment offenses. 27 A review of the Court's dockets and files shows Petitioner has previously sought 28 habeas relief with respect to this conviction. In Jerome Lamar Gentery v. Cheryl Pliler,

E.D. Cal. Case No. 1:99-cv-06414-AWI-HGB, on May 9, 2000, the Court denied on the merits Petitioner's petition for writ of habeas corpus that challenged the same judgment of the Kern County Superior Court. (See ECF Nos. 11, 17-18.) Additionally in case number 1:14-cv-00212-AWI-BAM (HC), Petitioner again challenged his underlying convictions. On April 4, 2014, the petition was denied as a successive petition. See Jermoe Lamar Gentery v. Rick Hill, E.D. Cal. Case No. 1:14-cv-00212-AWI-BAM (HC), ECF Nos. 12, 14.

I. DISCUSSION

A court must dismiss a second or successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). A 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 constitutional right, made retroactive by the United States Supreme Court 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; the Petitioner must first file a motion with the appropriate court of appeals to be authorized to file a second or successive petition with the district court.

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

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

II. ORDER AND RECOMMENDATION

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

These findings and recommendations are submitted to the United States District Court Judge assigned to the case, 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 thirty (30) days after being served with a copy, 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 Recommendations." The Court 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 waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014).

Date

Dated: <u>January 23, 2016</u>

IT IS SO ORDERED.

1st Michael J. Seng

JNITED STATES MAGISTRATE JUDGE

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