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

JEROME LAMAR GENTERY,
Petitioner,

v.

STU SHERMAN, Warden,
Respondent.

Case No. 1:16-cv-00085 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 14, 2016, Petitioner challenges a sentence imposed in the Kern County Superior Court on July 23, 1997 for murder and attempted murder with great bodily injury and firearm enhancements. (Pet., ECF No. 1 at 1.) Petitioner was sentenced to an indeterminate state prison term of sixty-one (61) years and four months to life. In the petition, Petitioner challenges his convictions, alleging that he suffered violations of his constitutional rights in the course of the trial and appellate proceedings related to his commitment offenses.

A review of the Court's dockets and files shows Petitioner has previously sought habeas relief with respect to this conviction. In Jerome Lamar Gentry v. Cheryl Pliier,

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

8 **I. DISCUSSION**

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

20 Section 2244 (b)(3)(A) provides: "Before a second or successive application
21 permitted by this section is filed in the district court, the applicant shall move in the
22 appropriate court of appeals for an order authorizing the district court to consider the
23 application." In other words, Petitioner must obtain leave from the Ninth Circuit before he
24 can file a second or successive petition in district court. See Felker v. Turpin, 518 U.S.
25 651, 656-657 (1996). This Court must dismiss any second or successive petition unless
26 the Court of Appeals has given Petitioner leave to file the petition because a district court
27 lacks subject-matter jurisdiction over a second or successive petition. Greenawalt v.
28 Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997).

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