

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

KENNETH RUSSELL BORK, JR.,
Petitioner,
v.
STU SHERMAN,
Respondent.

Case No. 1:16-cv-01844-DAD-SAB-HC

**FINDINGS AND RECOMMENDATION
RECOMMENDING DISMISSAL OF
PETITION FOR WRIT OF HABEAS
CORPUS**

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

DISCUSSION

21 Rule 4 of the Rules Governing Section 2254 Cases requires preliminary review of a
22 habeas petition and allows a district court to dismiss a petition before the respondent is ordered
23 to file a response, if it “plainly appears from the petition and any attached exhibits that the
24 petitioner is not entitled to relief in the district court.” A federal court must dismiss a second or
25 successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The
26 court must also dismiss a second or successive petition raising a new ground unless the petitioner
27 can show that (1) the claim rests on a new, retroactive, constitutional right or (2) the factual basis
28 of the claim was not previously discoverable through due diligence, and these new facts establish

1 by clear and convincing evidence that but for the constitutional error, no reasonable factfinder
2 would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)–(B).

3 However, it is not the district court that decides whether a second or successive petition
4 meets these requirements. Section 2244(b)(3)(A) provides: “Before a second or successive
5 application permitted by this section is filed in the district court, the applicant shall move in the
6 appropriate court of appeals for an order authorizing the district court to consider the
7 application.” In other words, Petitioner must obtain leave from the Ninth Circuit before he can
8 file a second or successive petition in the district court. See Felker v. Turpin, 518 U.S. 651, 656–
9 657 (1996). This Court must dismiss any second or successive petition unless the Court of
10 Appeals has given Petitioner leave to file the petition because a district court lacks subject-matter
11 jurisdiction over a second or successive petition. Burton v. Stewart, 549 U.S. 147, 157 (2007).

12 In the instant petition, Petitioner challenges his 1999 convictions in the Tulare County
13 Superior Court for receiving stolen property and being a felon in possession of a firearm. (ECF
14 No. 1 at 1).¹ Petitioner previously filed federal habeas petitions in this Court challenging the
15 same convictions. See Bork v. Scribner, No. 1:02-cv-06135-REC-DLB (denied on the merits);
16 Bork v. Sherman, No. 1:16-cv-00635-DAD-SAB (dismissed as unauthorized successive
17 petition).² In the instant petition, Petitioner acknowledges that he previously filed a habeas
18 petition in this Court. (ECF No. 1 at 17).

19 The Court finds that the instant petition is “second or successive” under § 2244(b).
20 Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file this
21 petition. As Petitioner has not obtained prior leave from the Ninth Circuit to file this successive
22 petition, this Court has no jurisdiction to consider Petitioner’s renewed application for relief
23 under 28 U.S.C. § 2254 and must dismiss the petition. See Burton, 549 U.S. at 157.

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

28 ² The Court may take judicial notice of its own records in other cases. United States v. Wilson, 631 F.2d 118, 119
(9th Cir. 1980).

II.

RECOMMENDATION

3 Accordingly, IT IS HEREBY RECOMMENDED that the petition for writ of habeas
4 corpus be DISMISSED as successive.

5 This Findings and Recommendation is submitted to the United States District Court
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304
7 of the Local Rules of Practice for the United States District Court, Eastern District of California.
8 Within **THIRTY (30) days** after service of the Findings and Recommendation, Petitioner may
9 file written objections with the Court and serve a copy on all parties. Such a document should be
10 captioned “Objections to Magistrate Judge’s Findings and Recommendation.” The assigned
11 District Judge will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. §
12 636(b)(1)(C). Petitioner is advised that failure to file objections within the specified time may
13 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014)
14 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **January 4, 2017**

George A. Bae
UNITED STATES MAGISTRATE JUDGE