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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

DEMOND MIMMS,	)	1:09-cv-01697-AWI-JLT HC
	)	
Petitioner,	)	FINDINGS AND RECOMMENDATIONS TO
	)	DISMISS SUCCESSIVE PETITION FOR
v.	)	WRIT OF HABEAS CORPUS PURSUANT
	)	TO 28 U.S.C. § 2244(b)
	)	
DARRYL ADAMS,	)	ORDER DIRECTING OBJECTIONS TO BE
	)	FILED WITHIN TWENTY DAYS
Respondent.	)	

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

In the petition filed on September 28, 2009, Petitioner challenges his June 16, 2006 conviction in Kings County Superior Court for battery upon a non-confined person while in state prison (“gassing”). Petitioner was sentenced to a prison term of two years. (Doc. 1, p. 1).

A review of the Court’s dockets and files, as well as Petitioner’s own allegations, show Petitioner has previously sought habeas relief with respect to this conviction.<sup>1</sup> In case number 1:06-cv-0923-VRW, a petition challenging the same conviction was denied on the merits and judgement

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<sup>1</sup>The Court takes judicial notice of the docket in case no. 1:02-cv-05251-REC-BAK HC. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9<sup>th</sup> Cir.1993); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n.1 (N.D.Cal.1978), aff’d, 645 F.2d 699, (9<sup>th</sup> Cir.) (Judicial notice may be taken of court records).

1 entered on May 6, 2009. The Court's records indicate that, on July 1, 2009, the United States Court  
2 of Appeals for the Ninth Circuit dismissed Petitioner's appeal of that denial "[b]ecause the appeal is  
3 so insubstantial as to not warrant further review."

#### 4 DISCUSSION

5 A federal court must dismiss a second or successive petition that raises the same grounds as a  
6 prior petition. 28 U.S.C. § 2244(b)(1). The Court must also dismiss a second or successive petition  
7 raising a new ground unless the petitioner can show that 1) the claim rests on a new, retroactive,  
8 constitutional right or 2) the factual basis of the claim was not previously discoverable through due  
9 diligence, and these new facts establish by clear and convincing evidence that but for the  
10 constitutional error, no reasonable fact-finder would have found the applicant guilty of the  
11 underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court that decides  
12 whether a second or successive petition meets these requirements, which allow a petitioner to file a  
13 second or successive petition.

14 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this  
15 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an  
16 order authorizing the district court to consider the application." In other words, Petitioner must  
17 obtain leave from the Ninth Circuit before he can file a second or successive petition in district court.  
18 See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or  
19 successive petition unless the Court of Appeals has given Petitioner leave to file the petition because  
20 a district court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United  
21 States, 129 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997),  
22 *cert. denied*, 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

23 Because the current petition was filed after April 24, 1996, the provisions of the  
24 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current  
25 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). The Court has reviewed the petition in this  
26 case and the petition in case no. 1:06-cv-0923-VRW, and has concluded that they challenge the same  
27 conviction and raise the same issues. Thus, the instant petition is a second or successive petition  
28 within the meaning of 28 U.S.C. § 2244(b)(1).

