



1 while committing rape, which Petitioner challenged in in case number 1:04-cv-05662-OWW-DLB,  
2 and also a consecutive 25-year-to-life sentence for a 2002 Tulare County Superior Court conviction  
3 for possession of a weapon by an inmate, which Petitioner challenged in a separate petition in case  
4 number 1:04-cv-05773-LJO-TAG. Both of the latter petitions were denied on the merits and in both  
5 cases the Ninth Circuit refused to issue a certificate of appealability and dismissed the appeals.

6 Now, Petitioner has once again sought to resurrect a challenge to his 1998 conviction for  
7 failure to register as a sex offender. For the reasons set forth below, the Court recommends that the  
8 petition be dismissed as successive.

### 9 DISCUSSION

10 A federal court must dismiss a second or successive petition that raises the same grounds as a  
11 prior petition. 28 U.S.C. § 2244(b)(1). The Court must also dismiss a second or successive petition  
12 raising a new ground unless the petitioner can show that 1) the claim rests on a new, retroactive,  
13 constitutional right 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 the constitutional  
15 error, no reasonable fact-finder would have found the applicant guilty of the underlying offense. 28  
16 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court that decides whether a second or  
17 successive petition meets these requirements, which allow a petitioner to file a second or successive  
18 petition.

19 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this  
20 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an  
21 order authorizing the district court to consider the application." In other words, Petitioner must obtain  
22 leave from the Ninth Circuit before he can file a second or successive petition in district court. See  
23 Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive  
24 petition unless the Court of Appeals has given Petitioner leave to file the petition because a district  
25 court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United States, 129  
26 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997), *cert. denied*,  
27 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).



