



1 1:01-cv-05157-OWW-SMS (denied on the merits on April 18, 2003); (2) case no. 1:01-cv-06220-  
2 OWW-HGB (dismissed on February 21, 2002 as duplicative of case no. 1:01-cv-05157-OWW-SMS);  
3 (3) case no. 1:05-cv-01101-AWI-DLB (dismissed on July 7, 2006 on Petitioner's own motion to  
4 withdraw); (4) 1:07-cv--00793-AWI-TAG (dismissed on March 17, 2008 for violation of the one-year  
5 statute of limitations in 28 U.S.C. § 2244(d)(1)); and (5) 1:11-cv-01147-AWI-MJS (dismissed on  
6 December 23, 2011 as successive).

### 7 DISCUSSION

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

15 However, it is not the district court that decides whether a second or successive petition meets  
16 these requirements that allow a petitioner to file a second or successive petition, but rather the Ninth  
17 Circuit. Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this  
18 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an  
19 order authorizing the district court to consider the application." In other words, Petitioner must obtain  
20 leave from the Ninth Circuit before he can file a second or successive petition in district court. See  
21 Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive  
22 petition unless the Court of Appeals has given Petitioner leave to file the petition because a district  
23 court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United States, 129  
24 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997), *cert. denied*,  
25 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

26 Because the current petition was filed after April 24, 1996, the provisions of the Antiterrorism  
27 and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. Lindh v.

1 Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has obtained prior leave from  
2 the Ninth Circuit to file this successive petition attacking his conviction. That being so, this Court has  
3 no jurisdiction to consider Petitioner's renewed application for relief from that conviction under §  
4 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991. If  
5 Petitioner desires to proceed in bringing this petition for writ of habeas corpus, he must first file for  
6 leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244 (b)(3).

7 **ORDER**

8 For the foregoing reasons, the Clerk of the Court is DIRECTED to assign a United States  
9 District judge to this case.

10 **RECOMMENDATION**

11 Accordingly, the Court RECOMMENDS that the Petition for Writ of Habeas Corpus be  
12 DISMISSED as a second and successive petition.

13 This Findings and Recommendation is submitted to the United States District Court Judge  
14 assigned to the case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
15 Rules of Practice for the United States District Court, Eastern District of California. Within twenty  
16 (20) days after being served with a copy of this Findings and Recommendation, any party may file  
17 written objections with the Court and serve a copy on all parties. Such a document should be  
18 captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the  
19 Objections shall be served and filed within ten (10) court days (plus three days if served by mail) after  
20 service of the Objections. The Court will then review the Magistrate Judge's ruling pursuant to 28  
21 U.S.C. § 636 (b)(1)(C).

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The parties are advised that failure to file objections within the specified time may waive the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

IT IS SO ORDERED.

Dated: May 23, 2012

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE