1		
2		
3		
4		
5		
6		
7		
8	UNITED STAT	TES DISTRICT COURT
9	EASTERN DIST	TRICT OF CALIFORNIA
10	HECTOR GARZA,	) Case No.: 1:12-cv-00827-JLT (HC)
11	Plaintiff,	<ul> <li>FINDINGS AND RECOMMENDATIONS TO</li> <li>DISMISS PETITION FOR WRIT OF HABEAS</li> </ul>
12	V.	) CORPUS AS SECOND AND SUCCESSIVE
13	R. GROUNDS,	) ) ORDER DIRECTING THAT OBJECTIONS BE
14	Defendant.	) FILED WITHIN TWENTY DAYS
15		<ul> <li>ORDER DIRECTING CLERK OF THE COURT TO</li> <li>ASSIGN CASE TO A DISTRICT JUDGE</li> </ul>
16		/ ASSIGN CASE TO A DISTRICT JUDGE
17		
18	Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas	
19	corpus pursuant to 28 U.S.C. § 2254.	
20	PROCED	DURAL HISTORY
21	The instant petition was filed on May 1	4, 2012, in the Sacramento Division of this Court.
22	(Doc. 1). On May 21, 2012, the case was trans	sferred to the Fresno Division. (Doc. 4). In the course
23	of conducting a preliminary screening of the pe	etition, it has come to the Court's attention that
24	Petitioner has previously filed one or more fede	eral habeas petitions challenging this same conviction.
25	A review of the Court's own docket ref	flects that Petitioner has previously filed the following
26	petitions in this Court, all challenging Petitioner's 1998 Fresno County Superior Court conviction for	
27	possession of cocaine base, and his subsequent	e sentence of twenty-five-years-to-life: (1) case no.
28		1

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

## **DISCUSSION**

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

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

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

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) <u>court</u> 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).
22	///
23	///
24	///
25	///
26	///
27	
28	3

1	The parties are advised that failure to file objections within the specified time may waive the
2	right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).
3	
4	
5	IT IS SO ORDERED.
6	Dated: May 23, 2012 /s/ Jennifer L. Thurston
7	UNITED STATES MAGISTRATE JUDGE
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22 23	
23 24	
24 25	
23 26	
27	
28	4