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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

**RAMON NAVARRO LUPERCIO,**  
Petitioner,  
  
v.  
  
**STU SHERMAN, Warden,**  
Respondent.

Case No. 1:15-cv-01834 MJS (HC)

**FINDINGS AND RECOMMENDATION TO  
DISMISS SUCCESSIVE PETITION FOR  
WRIT OF HABEAS CORPUS PURSUANT  
TO 28 U.S.C. § 2244(b)**

**ORDER DIRECTING CLERK OF COURT  
TO ASSIGN DISTRICT COURT JUDGE TO  
THE PRESENT MATTER**

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

In the petition filed on December 8, 2015, Petitioner challenges an October 13, 2003 conviction in the Superior Court of California, County of Tulare for attempted murder with use of a firearm. Petitioner was sentenced to an indeterminate state prison term of thirty two (32) years to life.

A review of the Court's dockets and files shows Petitioner has previously sought habeas relief with respect to this conviction. In case number 1:08-cv-00012-LJO-JLT (HC), Petitioner challenged the same underlying conviction. On January 22, 2009, the

1 petition was denied as untimely.<sup>1</sup> See Lupercio v. Gonzalez, E.D. Cal. Case No. 1:08-cv-  
2 00012-LJO-JLT (HC), ECF Nos. 15, 18.

3 **I. DISCUSSION**

4 A court must dismiss a second or successive petition that raises the same  
5 grounds as a prior petition. 28 U.S.C. § 2244(b)(1). A court must also dismiss a second  
6 or successive petition raising a new ground unless the petitioner can show that 1) the  
7 claim rests on a new constitutional right, made retroactive by the United States Supreme  
8 Court 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  
10 the constitutional error, no reasonable factfinder would have found the applicant guilty of  
11 the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court  
12 that decides whether a second or successive petition meets these requirements; the  
13 Petitioner must first file a motion with the appropriate court of appeals to be authorized to  
14 file a second or successive petition with the district court.

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

24 Because the current petition was filed after April 24, 1996, the provisions of the  
25 Antiterrorism and Effective Death Penalty Act of 1996 apply to Petitioner's current  
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27 <sup>1</sup> In McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009), the Ninth Circuit held that dismissal of  
28 a habeas petition for failure to comply with the AEDPA statute of limitations renders subsequent petitions  
challenging the same conviction successive.

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

8 **II. ORDER AND RECOMMENDATION**

9 The Court RECOMMENDS that the petition for writ of habeas corpus be  
10 DISMISSED as successive. Further, the Court ORDERS the Clerk of Court to assign a  
11 District Court judge to the instant matter.

12 These findings and recommendations are submitted to the United States  
13 District Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636  
14 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,  
15 Eastern District of California. Within thirty (30) days after being served with a copy, any  
16 party may file written objections with the Court and serve a copy on all parties. Such a  
17 document should be captioned "Objections to Magistrate Judge's Findings and  
18 Recommendations." Replies to the objections shall be served and filed within fourteen  
19 (14) days (plus three days if served by mail) after service of the objections. The Court  
20 will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c). The  
21 parties are advised that failure to file objections within the specified time may waive the  
22 right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th  
23 Cir. 2014).

24  
25 IT IS SO ORDERED.

26 Dated: January 13, 2016

27 /s/ Michael J. Seng  
28 UNITED STATES MAGISTRATE JUDGE

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