



1 Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas  
2 corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after  
3 an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9<sup>th</sup> Cir.2001).

4 B. Successive Petitions. [§ 2254]

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, as here, a *new ground*, unless the petitioner can show that 1) the claim rests on a new,  
8 retroactive, constitutional right or 2) the factual basis of the claim was not previously discoverable  
9 through due 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 underlying  
11 offense. 28 U.S.C. § 2244(b)(2)(A)-(B).

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

24 Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file this  
25 successive petition attacking his 2008 conviction. Thus, the Court has no jurisdiction to consider  
26 Petitioner's renewed application for relief from that conviction under § 2254 and must dismiss the  
27 petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991.

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**ORDER**

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

**RECOMMENDATION**

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

This Findings and Recommendation is submitted to the United States District Court Judge assigned to the case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. **Within 21 days** after being served with a copy of this Findings and Recommendation, any party may file written objections with the Court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the Objections shall be served and filed **within 10 days** (plus three days if served by mail) after service of the Objections. The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). 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: January 6, 2016

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE