

1 if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is
2 not entitled to relief in the district court” The Advisory Committee Notes to Rule 8 indicate that
3 the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4,
4 pursuant to the respondent’s motion to dismiss, or after an answer to the petition has been filed.
5 Herbst v. Cook, 260 F.3d 1039 (9th Cir.2001).

6 B. Successive Petitions. [§ 2254]

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

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

25 Because the current petition was filed after April 24, 1996, the provisions of the Antiterrorism
26 and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. Lindh v.
27 Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has obtained prior leave from
28 the Ninth Circuit to file this successive petition attacking his conviction. Rather, Petitioner, after

1 candidly acknowledging the existence of his prior habeas petition, argues that the Court erred in its
2 earlier denial of that petition. (Doc. 1). That being the case, this Court has no jurisdiction to consider
3 Petitioner's renewed application for relief from that 1986 conviction under § 2254 and must dismiss the
4 petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991. **If Petitioner desires to proceed**
5 **in bringing this petition for writ of habeas corpus, he must first file for leave to do so with the**
6 **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 21 days**
16 after being served with this Findings and Recommendation, any party may file written objections with
17 the Court and serve a copy on all parties. Such a document should be captioned "Objections to
18 Magistrate Judge's Findings and Recommendation." Replies to the Objections shall be served and filed
19 **within 10 days** (plus three days if served by mail) after service of the Objections. The Court will then
20 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised
21 that failure to file objections within the specified time may waive the right to appeal the Order of the
22 District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23
24 IT IS SO ORDERED.

25 Dated: January 14, 2016

25 /s/ Jennifer L. Thurston
26 UNITED STATES MAGISTRATE JUDGE