

1 corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after
2 an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9th Cir.2001).

3 B. Successive Petitions. [§ 2254]

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

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

23 Because the current petition was filed after April 24, 1996, the provisions of the Antiterrorism
24 and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. Lindh v.
25 Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has obtained prior leave from
26 the Ninth Circuit to file this successive petition attacking his conviction. That being so, this Court has
27 no jurisdiction to consider Petitioner's renewed application for relief from that conviction under §
28 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991. If

1 Petitioner desires to proceed in bringing this petition for writ of habeas corpus, he must first file for
2 leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244 (b)(3).

3 **ORDER**

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

6 **RECOMMENDATION**

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

9 This Findings and Recommendation is submitted to the United States District Court Judge
10 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
11 Local Rules of Practice for the United States District Court, Eastern District of California. **Within 21**
12 **days** after being served with a copy, any party may file written objections with the court and serve a
13 copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings
14 and Recommendation.” Replies to the objections shall be served and filed **within 10 days** (plus three
15 days if served by mail) after service of the objections. The Court will then review the Magistrate
16 Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file
17 objections within the specified time may waive the right to appeal the District Court’s order. Martinez
18 v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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20 IT IS SO ORDERED.

21 Dated: March 8, 2016

22 /s/ Jennifer L. Thurston
23 UNITED STATES MAGISTRATE JUDGE
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