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8	UNITED STATES DISTRICT COURT	
9	EASTERN DISTRICT OF CALIFORNIA	
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11	SOKHEAN KEO,	) Case No.: 1:16-cv-00288-JLT
12	Petitioner,	<ul> <li>FINDINGS AND RECOMMENDATIONS TO</li> <li>DISMISS PETITION FOR WRIT OF HABEAS</li> </ul>
13	v.	) CORPUS AS SECOND AND SUCCESSIVE
14	DAVID LONG,	) ORDER DIRECTING THAT OBJECTIONS BE ) FILED WITHIN TWENTY-ONE DAYS
15	Respondent.	) ORDER DIRECTING CLERK OF THE COURT TO
16		) ASSIGN DISTRICT JUDGE TO CASE
17	In this action, Petitioner challenges the sentenced imposed after he was convicted in 1988 of	
18	various crimes. However, the Court's notes that Petitioner has previously filed one prior federal	
19	habeas petition challenging this same conviction in case number 1:03-cv-5329-REC-HGB ("03-5329).	
20	That earlier case was dismissed for violation of the one-year statute of limitations. Because Petitioner	
21	has failed to demonstrate he has been granted permission to file a successive petition, the Court	
22	<b>RECOMMENDS</b> the petition be <b>DISMISSED</b> .	
23	DISCUSSION	
24	A. <u>Preliminary Review of Petition</u> .	
25	Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition	
26	if it "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is	
27	not entitled to relief in the district court" Rule 4 of the Rules Governing Section 2254 Cases. The	
28	Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas	
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corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after an answer to the petition has been filed. <u>Herbst v. Cook</u>, 260 F.3d 1039 (9<sup>th</sup> Cir.2001).

B. Successive Petitions. [§ 2254]

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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 11 12 meets these requirements that allow a petitioner to file a second or successive petition, but rather the Ninth Circuit Court of Appeals. Section 2244 (b)(3)(A) provides: "Before a second or successive 13 14 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 15 16 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 17 must dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave 18 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 (7th Cir. 1996). 22

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> <u>Murphy</u>, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file this successive petition attacking his conviction. That being so, this Court has no jurisdiction to consider Petitioner's renewed application for relief from that conviction under § 2254 and must dismiss the petition. <u>See Greenawalt</u>, 105 F.3d at 1277; <u>Nunez</u>, 96 F.3d at 991. If

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

## <u>ORDER</u>

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.

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

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) || IT IS SO ORDERED.

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Dated: March 8, 2016

/s/ Jennifer L. Thurston UNITED STATES MAGISTRATE JUDGE

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