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

**STACEY D. DYER,**

Petitioner,

v.

**D.G. ADAMS, Warden,**

Respondent.

Case No. 1:16-cv-01726 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 November 15, 2016, Petitioner challenges a May 19, 2004 conviction in the Superior Court of California, County of Fresno for first degree murder, second degree robbery, kidnapping, and various enhancements. Petitioner was sentenced to an indeterminate state prison term of life without the possibility of parole.

A review of the Court's dockets and files shows Petitioner has previously sought habeas relief with respect to this conviction. In case number 1:09-cv-00150-OWW-SMS (HC), Petitioner challenged the same underlying conviction. On December 15, 2009, the petition was denied on the merits. The denial was affirmed by the Ninth Circuit in a published decision on February 6, 2013. See Dyer v. Hornbeck, 706 F.3d 1134 (9th Cir.

1 2013).

2 **I. Discussion**

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

14 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  
16 appropriate court of appeals for an order authorizing the district court to consider the  
17 application." In other words, Petitioner must obtain leave from the Ninth Circuit before he  
18 can file a second or successive petition in district court. See Felker v. Turpin, 518 U.S.  
19 651, 656-657 (1996). This Court must dismiss any second or successive petition unless  
20 the Court of Appeals has given Petitioner leave to file the petition because a district court  
21 lacks subject-matter jurisdiction over a second or successive petition. Greenawalt v.  
22 Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997).

23 Because the current petition was filed after April 24, 1996, the provisions of the  
24 Antiterrorism and Effective Death Penalty Act of 1996 apply to Petitioner's current  
25 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that  
26 she has obtained prior leave from the Ninth Circuit to file her successive petition  
27 attacking the conviction. That being so, this Court has no jurisdiction to consider  
28 Petitioner's renewed application for relief under Section 2254 and must dismiss the

1 petition. See Greenawalt, 105 F.3d at 1277. If Petitioner desires to proceed in bringing  
2 this petition for writ of habeas corpus, she must file for leave to do so with the Ninth  
3 Circuit. See 28 U.S.C. § 2244(b)(3).

4 **II. Order and Recommendation**

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

8 These findings and recommendations are submitted to the United States District  
9 Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636  
10 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,  
11 Eastern District of California. Within thirty (30) days after being served with a copy, any  
12 party may file written objections with the Court and serve a copy on all parties. Such a  
13 document should be captioned "Objections to Magistrate Judge's Findings and  
14 Recommendations." Replies to the objections shall be served and filed within fourteen  
15 (14) days (plus three days if served by mail) after service of the objections. The Court  
16 will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c).

17 The parties are advised that failure to file objections within the specified time may  
18 waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834,  
19 839 (9th Cir. 2014).

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21 IT IS SO ORDERED.

22 Dated: November 17, 2016

/s/ Michael J. Seng  
23 UNITED STATES MAGISTRATE JUDGE

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