



1 untimely constitutes a disposition on the merits and [ ] a further petition challenging the same  
2 conviction [is] ‘second or successive’ for purposes of 28 U.S.C. § 2244(b).” McNabb v. Yates,  
3 576 F.3d 1028, 1029 (9th Cir. 2009); see also Murray v. Greiner, 394 F.3d 78, 81 (2d Cir. 2005)  
4 (dismissal of habeas petition as time barred constitutes an adjudication on the merits that renders  
5 future petitions under § 2254 challenging the same conviction ‘second or successive’ petitions  
6 under § 2244(b).”). Because petitioner challenges the same judgment now that he previously  
7 challenged and which was adjudicated on the merits, the petition now pending is second or  
8 successive.

9 Before petitioner can proceed with the instant application, he must move in the United  
10 States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider  
11 the application. 28 U.S.C. § 2244(b)(3). Therefore, petitioner’s application must be dismissed  
12 without prejudice to its re-filing upon obtaining authorization from the United States Court of  
13 Appeals for the Ninth Circuit.

14 In accordance with the above, IT IS HEREBY ORDERED that:

- 15 1. Petitioner’s application to proceed in forma pauperis (ECF No. 2) is granted;
- 16 2. The Clerk of the Court randomly assign a United States District Judge to this action.


17 and

18 IT IS RECOMMENDED that this action be dismissed without prejudice.

19 These findings and recommendations are submitted to the United States District Judge  
20 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
21 after being served with these findings and recommendations, petitioner may file written  
22 objections with the court. The document should be captioned “Objections to Magistrate Judge’s  
23 Findings and Recommendations.” Petitioner is advised that failure to file objections within the  
24 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951  
25 F.2d 1153 (9th Cir. 1991).

26 Dated: March 17, 2016

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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE