

1 Cir. 2001) (per curiam), cert. denied, 538 U.S. 984, 123 S.Ct. 1793 (2003). The Antiterrorism and
2 Effective Death Penalty Act of 1996 (“AEDPA”) provides that a claim presented in a second or
3 successive federal habeas petition that was not presented in a prior petition shall be dismissed
4 unless:

5 (A) the applicant shows that the claim relies on a new rule of
6 constitutional law, made retroactive to cases on collateral review by
7 the Supreme Court, that was previously unavailable; or

8 (B)(i) the factual predicate for the claim could not have been
9 discovered previously through the exercise of due diligence; and

10 (ii) the facts underlying the claim, if proven and viewed in light of the
11 evidence as a whole, would be sufficient to establish by clear and
12 convincing evidence that, but for constitutional error, no reasonable
13 factfinder would have found the applicant guilty of the underlying
14 offense.

15 28 U.S.C. § 2244(b)(2)(A), (B).

16 Furthermore, “[b]efore a second or successive application permitted by this section is filed
17 in the district court, the applicant shall move in the appropriate court of appeals for an order
18 authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A).

19 In his 2003 federal habeas challenge, petitioner raised the following claims: (1) petitioner’s
20 statutory right to a jury trial on the allegations that he had suffered a prior serious or violent felony
21 conviction was violated when the trial court denied his request for a jury trial as to those
22 allegations; (2) petitioner’s state statutory right to a jury trial on the prior conviction allegations was
23 violated; (3) denial of the right to a jury trial on sentencing enhancements is never harmless error;
24 (4) there was insufficient evidence to support petitioner’s convictions for assault with a firearm; (5)
25 the search of petitioner’s suitcase was without probable cause and amounts to a violation of
26 petitioner’s Fourth Amendment rights; (6) petitioner received ineffective assistance of trial and
27 appellate counsel; (7) the trial court violated petitioner’s right to due process when it showed
28 partiality toward the prosecution; (8) the testimony of Officer Jamie McBride should be rejected
under CALJIC No. 2.21.2 and in light of new evidence that demonstrates his testimony was
willfully false; (9) the testimony of Officer Farber should be rejected because it was also willfully
false; and (10) petitioner’s prior felony conviction should be stricken because it occurred prior to

1 March 7, 1994. (See Report and Recommendation, filed June 9, 2005, at pp. 4-5). As mentioned
2 above, the action was dismissed on the merits and with prejudice. (See Order Adopting
3 Magistrate Judge’s Report and Recommendation and Judgment, both entered on July 20, 2005).

4 In the instant Petition, petitioner sets forth the following claim: “petitioner[’s] state and
5 federal constitutional rights [were] violated when the trial court imposed an unauthorized state
6 sentence” (Petition at p. 5). However, even if petitioner’s claim in the instant Petition satisfied
7 the AEDPA standards for filing a successive petition (although it does not appear that it satisfies
8 28 U.S.C. § 2244(b)(2)(A) or (B)), he nevertheless is required to first seek authorization from the
9 Ninth Circuit before filing a successive petition. 28 U.S.C. § 2244(b)(3)(A). Here, there is no
10 indication that petitioner has obtained such permission from the Ninth Circuit. In fact, the record
11 shows that the Ninth Circuit in 2008 denied petitioner’s request to file a successive petition.
12 (See Docket Entry No. 43 in Case No. CV 03-2820-VAP (PLA)). See Burton v. Stewart, 549 U.S.
13 147, 153, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007) (AEDPA requires petitioner to receive
14 authorization from the Court of Appeals before filing a second habeas petition). It therefore
15 appears that the Court is without jurisdiction to entertain the current Petition under 28 U.S.C. §
16 2244(b). See id.; Cooper, 274 F.3d at 1274 (“When the AEDPA is in play, the district court may
17 not, in the absence of proper authorization from the court of appeals, consider a second or
18 successive habeas application.”) (citation omitted).¹

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27 ¹ Even if petitioner were asserting that he should be permitted to file a successive petition
28 under 28 U.S.C. § 2244(b)(2)(B) because newly discovered facts show that he is actually innocent
of the crimes for which he was convicted, 28 U.S.C. § 2244(b)(3)(A) still requires him to obtain
authorization from the Ninth Circuit to file a successive petition.

1 Accordingly, petitioner is **ordered to show cause** why the instant Petition should not be
2 dismissed as successive. Specifically, petitioner must submit to the Court **no later than March**
3 **2, 2011**, documentation showing that, pursuant to 28 U.S.C. § 2244(b)(3)(A), he properly filed a
4 motion in the Ninth Circuit for an order authorizing the district court to consider a successive
5 petition, and that the Ninth Circuit issued such an order. **Failure to respond by March 2, 2011,**
6 **will result in the instant Petition being summarily dismissed without prejudice.**² See Reyes
7 v. Vaughn, 276 F.Supp.2d 1027, 1029-30 (C.D. Cal. 2003) (dismissing successive petition without
8 prejudice to petitioner's right to seek authorization from the Ninth Circuit).

9 **IT IS SO ORDERED.**



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11 DATED: February 9, 2011

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13 PAUL L. ABRAMS
14 UNITED STATES MAGISTRATE JUDGE
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24 ² In the event that petitioner has not complied with 28 U.S.C. § 2244(b)(3)(A), and he
25 does not provide documentation showing that he is not required to first receive Ninth Circuit
26 authorization before filing a successive petition, he is advised that if he wishes to make a
27 successive habeas application, he must file a "Motion for Order Authorizing District Court to
28 Consider Second or Successive Petition Pursuant to 28 U.S.C. § 2244(b)(3)(A)" directly with the
Ninth Circuit. Until the Ninth Circuit issues such an order, any direct or implied request for a
second or successive petition for writ of habeas corpus is barred by § 2244(b) and must be
dismissed **without prejudice** to petitioner's right to seek authorization from the Ninth Circuit to
file the petition.