

1 on September 25, 2007. (Case No. CV 06-6026, Dkt. No. 16). Petitioner’s request for a certificate
2 of appealability was denied by the District Judge on October 22, 2007. (Case No. CV 06-6026,
3 Dkt. No. 18). His request to the Ninth Circuit for a certificate of appealability was denied on June
4 23, 2008. (Case No. CV 06-6026, Dkt. No. 22).

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6 **A. SECOND OR SUCCESSIVE PETITIONS**

7 A federal habeas petition is successive if it raises claims that were or could have been
8 adjudicated on the merits in a previous petition. Cooper v. Calderon, 274 F.3d 1270, 1273 (9th
9 Cir. 2001) (per curiam). The AEDPA provides that a claim presented in a second or successive
10 federal habeas petition that was not presented in a prior petition shall be dismissed unless:

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

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

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

17 28 U.S.C. § 2244(b)(2)(A), (B).

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

21 In his 2006 Petition, petitioner raised the following grounds for relief: (1) petitioner’s due
22 process rights were violated when the trial court permitted the prosecutor to introduce evidence
23 that petitioner had attempted to escape from custody; (2) petitioner’s due process rights were
24 violated because the jury had insufficient evidence to convict him of the attempted murders of
25 Gilbert and Oscar Fonoti; and (3) the firearm-use enhancements were contrary to state law.
26 (Case No. 06-6026, Dkt. No. 8 at 9). As mentioned above, the 2006 Petition was denied on the
27 merits. In the instant 2015 Petition, petitioner appears to raise at least the following claims: (1)
28 trial counsel rendered ineffective assistance by failing to object to prejudicial evidence, and

1 misconduct by the prosecution; (2) petitioner’s constitutional rights were violated by suggestive
2 identification procedures, and false testimony and statements; and (3) petitioner’s constitutional
3 rights were violated by “denial” DNA testing authorized by Penal Code section 1405. (2015 Pet.
4 at 3-A to 4-U).

5 Because the 2006 Petition was denied on the merits, the instant 2015 Petition is considered
6 to be a successive application. Even if petitioner’s claims in the 2015 Petition satisfied the AEDPA
7 standards for filing a successive petition -- which they do not appear to do -- he nevertheless is
8 required to seek and obtain authorization from the Ninth Circuit before filing a successive petition.
9 28 U.S.C. § 2244(b)(3)(A). There is no indication that petitioner has obtained such permission
10 from the Ninth Circuit. See Burton v. Stewart, 549 U.S. 147, 153, 127 S. Ct. 793, 166 L. Ed. 2d
11 628 (2007) (AEDPA requires petitioner to receive authorization from the Court of Appeals before
12 filing a second habeas petition). It therefore appears that the Court is without jurisdiction to
13 entertain the 2015 Petition under 28 U.S.C. § 2244(b). See id.; Cooper, 274 F.3d at 1274 (“When
14 the AEDPA is in play, the district court may not, in the absence of proper authorization from the
15 court of appeals, consider a second or successive habeas application.”).

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17 **B. STATUTE OF LIMITATIONS**

18 Even if not successive, or even if the Ninth Circuit grants petitioner permission to file a
19 successive petition, the 2015 Petition is subject to the Antiterrorism and Effective Death Penalty
20 Act of 1996 (“AEDPA”) one-year statute of limitations period, as set forth under 28 U.S.C. §
21 2244(d). See Calderon v. U. S. Dist. Court (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997).¹ In
22 most cases, the limitation period begins to run from “the date on which the judgment became final
23 by conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. §
24 2244(d)(1)(A).

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¹ Beeler was overruled on other grounds in Calderon v. U. S. Dist. Court (Kelly), 163 F.3d
530, 540 (9th Cir. 1998) (en banc).

1 As stated above, petitioner was convicted on March 25, 2004. (2015 Pet. at 2). Petitioner
2 appealed to the California Court of Appeal, and the court of appeal affirmed the judgment. (2015
3 Pet. at 2-3; Case No. 06-6026, Dkt. No. 8 at 2). His petition for review in the California Supreme
4 Court was denied on July 27, 2005, without comment or citation to authority (2015 Pet. at 3; Case
5 No. 06-6026, Dkt. No. 8 at 2), and his conviction became final on October 25, 2005, when the
6 ninety-day period for filing a petition for certiorari in the Supreme Court expired. Bowen v. Roe,
7 188 F.3d 1157, 1158-59 (9th Cir. 1999). Thus, the one-year limitation period for seeking federal
8 habeas relief began to run on October 26, 2005, and expired on October 25, 2006.

9 On its face, therefore, it appears that the instant 2015 Petition, in addition to being
10 successive, is barred by the statute of limitations.

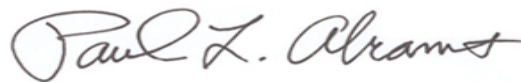
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12 **C. CONCLUSION**

13 Based on the foregoing, petitioner is **ordered to show cause** (1) why the 2015 Petition
14 should not be dismissed as successive; and (2) why the 2015 Petition should not be dismissed
15 as time barred.

16 Specifically, **no later than July 1, 2015**, petitioner must submit to the Court the following:
17 (1) documentation showing that, pursuant to 28 U.S.C. § 2244(b)(3)(A), he properly filed a motion
18 in the Ninth Circuit for an order authorizing the district court to consider a successive petition, and
19 that the Ninth Circuit issued such an order; and (2) a response making clear his arguments, if any,
20 as to why the 2015 Petition should not be dismissed as time barred. All facts relied upon by
21 petitioner must be proved by testimony contained in a declaration signed under penalty of perjury
22 pursuant to 28 U.S.C. § 1746, or in properly authenticated documents.

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1 **Failure to respond by July 1, 2015, will result in the 2015 Petition being summarily**
2 **dismissed as successive and/or as barred by the statute of limitations.**²

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4 DATED: June 4, 2015

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PAUL L. ABRAMS
6 UNITED STATES MAGISTRATE JUDGE

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23 ² In the event that petitioner has not complied with 28 U.S.C. § 2244(b)(3)(A), and he does
24 not provide documentation showing that he is not required to first receive Ninth Circuit
25 authorization before filing a successive petition, he is advised that if he wishes to make a
26 successive habeas application, he must file a “Motion for Order Authorizing District Court to
27 Consider Second or Successive Petition Pursuant to 28 U.S.C. § 2244(b)(3)(A)” **directly with the**
28 **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.