

1 (Case No. CV 02-2733, ECF No. 25). On November 9, 2004, the Ninth Circuit affirmed the
2 Judgment. (Case No. CV 02-2733, ECF No. 30). On March 3, 2011, petitioner filed a Motion for
3 Relief from Judgment (Case No. CV 02-2733, ECF No. 32) that was denied by the District Judge
4 on August 30, 2011. (Case No. CV 02-2733, ECF No. 33).

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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 Petitioner’s 2002 Petition raised the following grounds for relief: (1) ineffective assistance
22 of counsel; and (2) abuse of discretion. (See 2017 Pet. at 7). As mentioned above, that action
23 was dismissed with prejudice as time barred. In the 2017 Petition, petitioner raises the following
24 claims: (1) the trial court incorrectly imposed California’s Three Strikes law on petitioner; (2) the
25 trial court failed to prove petitioner’s prior strikes beyond a reasonable doubt; and (3) trial counsel
26 rendered ineffective assistance during the sentencing phase. (2017 Pet. at 5-6).

1 A habeas petition that has been dismissed for failure to comply with the statute of limitations
2 “renders subsequent petitions second or successive for purposes of the AEDPA.” McNabb v.
3 Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (contrasting Slack v. McDaniel, 529 U.S. 473, 485-86,
4 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), which held that a prior petition dismissed without
5 prejudice for failure to exhaust state remedies leaves open the possibility for future litigation); see
6 also Henderson v. Lampert, 396 F.3d 1049, 1053 (9th Cir. 2005) (a dismissal of a first petition with
7 prejudice because of a procedural default constitutes a disposition on the merits and renders a
8 subsequent petition second or successive for purposes of 28 U.S.C. § 2244(b)).

9 Accordingly, because the 2002 Petition was dismissed with prejudice as time barred, and
10 the 2017 Petition raises claims that were or could have been adjudicated on the merits in a
11 previous petition, the 2017 Petition is considered to be a successive application. Even if
12 petitioner’s claims in the 2017 Petition satisfied the AEDPA standards for filing a successive
13 petition -- which they do not appear to do -- **he nevertheless is required to seek authorization**
14 **from the Ninth Circuit before filing a successive petition.** 28 U.S.C. § 2244(b)(3)(A). Here,
15 there is no indication that petitioner has obtained such permission from the Ninth Circuit. See
16 Burton v. Stewart, 549 U.S. 147, 153, 127 S. Ct. 793, 166 L. Ed. 2d 628 (2007) (AEDPA requires
17 petitioner to receive authorization from the Court of Appeals before filing a second habeas
18 petition). It therefore appears that the Court is without jurisdiction to entertain the 2017 Petition
19 under 28 U.S.C. § 2244(b). See id.; Cooper, 274 F.3d at 1274 (“When the AEDPA is in play, the
20 district court may not, in the absence of proper authorization from the court of appeals, consider
21 a second or successive habeas application.”).

22 Accordingly, it appears that dismissal of the Petition as successive is appropriate.

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1 **B. STATUTE OF LIMITATIONS**

2 The 2017 Petition is subject to the Antiterrorism and Effective Death Penalty Act of 1996
3 (“AEDPA”) one-year statute of limitations period, as set forth under 28 U.S.C. § 2244(d). See
4 Calderon v. U.S. Dist. Ct. (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997).¹ In most cases, the
5 limitation period begins to run from “the date on which the judgment became final by conclusion
6 of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

7 As found by the District Judge in case number CV 02-2733, and as affirmed by the Ninth
8 Circuit on appeal, petitioner’s conviction became final, at the latest, on December 24, 2000, sixty
9 days after petitioner’s October 25, 2000, re-sentencing by the trial court. (See Case No. CV 02-
10 2733, ECF Nos. 17 at 2-4, 30). Petitioner filed the instant Petition on May 31, 2017. (ECF No.
11 1). On its face, therefore, it appears that the 2017 Petition, as was true of the 2002 Petition, is
12 barred by the statute of limitations.

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14 **C. CONCLUSION**

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

18 Specifically, **no later than July 3, 2017**, petitioner must submit to the Court the following:
19 (1) documentation showing that, pursuant to 28 U.S.C. § 2244(b)(3)(A), he properly filed a motion
20 in the Ninth Circuit for an order authorizing the district court to consider a successive petition, **and**
21 **that the Ninth Circuit issued such an order**; and (2) a response making clear his arguments,
22 if any, as to why the 2017 Petition should not be dismissed as time barred. All facts relied upon
23 by petitioner must be proved by testimony contained in a declaration signed under penalty of
24 perjury pursuant to 28 U.S.C. § 1746, or in properly authenticated documents.

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

