



1 case number CIV-F-98-5493 OWW/DLB P, the petition was dismissed as untimely. (L.D. Nos.  
2 22-23.)

3 **I. DISCUSSION**

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

15 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted  
16 by this section is filed in the district court, the applicant shall move in the appropriate court of  
17 appeals for an order authorizing the district court to consider the application." In other words,  
18 Petitioner must obtain leave from the Ninth Circuit before he can file a second or successive  
19 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must  
20 dismiss any second or successive petition unless the Court of Appeals has given Petitioner  
21 leave to file the petition because a district court lacks subject-matter jurisdiction over a second  
22 or successive petition. Greenawalt v. 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 petition.  
25 Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has obtained  
26 prior leave from the Ninth Circuit to file his successive petition attacking the conviction. That  
27 being so, this Court has no jurisdiction to consider Petitioner's renewed application for relief  
28 from that conviction under Section 2254 and must dismiss the petition. See Greenawalt, 105

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

3 Respondent also alleges that the petition is untimely under 28 U.S.C. § 2244(d).  
4 However, as this Court lacks subject matter jurisdiction over the petition and the petition must  
5 be dismissed, the Court shall not address issues regarding the expiration of the statute of  
6 limitations.

## 7 **II. CERTIFICATE OF APPEALABILITY**

8 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal  
9 a district court's denial of his petition, and an appeal is only allowed in certain circumstances.  
10 Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining  
11 whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

12 (a) In a habeas corpus proceeding or a proceeding under  
13 section 2255 before a district judge, the final order shall be subject  
14 to review, on appeal, by the court of appeals for the circuit in  
15 which the proceeding is held.

16 (b) There shall be no right of appeal from a final order in a  
17 proceeding to test the validity of a warrant to remove to another  
18 district or place for commitment or trial a person charged with a  
19 criminal offense against the United States, or to test the validity of  
20 such person's detention pending removal proceedings.

21 (c)(1) Unless a circuit justice or judge issues a certificate of  
22 appealability, an appeal may not be taken to the court of  
23 appeals from—

24 (A) the final order in a habeas corpus proceeding in  
25 which the detention complained of arises out of  
26 process issued by a State court; or

27 (B) the final order in a proceeding under section  
28 2255.

(2) A certificate of appealability may issue under paragraph  
(1) only if the applicant has made a substantial showing of the  
denial of a constitutional right.

(3) The certificate of appealability under paragraph (1)  
shall indicate which specific issue or issues satisfy the showing  
required by paragraph (2).

If a court denies a petitioner's petition, the court may only issue a certificate of  
appealability "if jurists of reason could disagree with the district court's resolution of his

1 constitutional claims or that jurists could conclude the issues presented are adequate to  
2 deserve encouragement to proceed further." Miller-EI, 123 S.Ct. at 1034; Slack v. McDaniel,  
3 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the merits of his case,  
4 he must demonstrate "something more than the absence of frivolity or the existence of mere  
5 good faith on his . . . part." Miller-EI, 123 S.Ct. at 1040.

6 In the present case, reasonable jurists would not find the Court's determination (that  
7 Petitioner is not entitled to federal habeas corpus relief) debatable or wrong nor would they  
8 find the Petition deserving of encouragement to proceed further. Petitioner has not made the  
9 required substantial showing of the denial of a constitutional right. Accordingly, the Court  
10 hereby DECLINES to issue a certificate of appealability.

11 **III. ORDER**

12 Accordingly, IT IS HEREBY ORDERED that:

- 13 1. The Petition for Writ of Habeas Corpus is DISMISSED as successive;
- 14 2. The Clerk of Court is DIRECTED to enter judgment; and
- 15 3. The Court DECLINES to issue a certificate of appealability.

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19 IT IS SO ORDERED.

20 Dated: October 22, 2010

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

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