

1 On September 27, 2011, Petitioner filed a response to the order to show cause. Petitioner
2 explains that "Petitioner's 2010 federal habeas petition alleges, for the most part, different
3 grounds from those alleged in Petitioner's earlier 2004 petition." (Response, ECF No. 10 at
4 3.) The first petition mostly focused on Petitioner's mental state and his competency to stand
5 trial or have the requisite mental state required to be found guilty of the underlying offenses.
6 Alternatively, the instant petition focuses mostly on trial counsel's failure to investigate the
7 truthfulness of the testimony of the victim at trial.¹ (Id. at 3-4.) Alleging that the claims in the
8 instant petition, notwithstanding one duplicative claim, were newly discovered, and not
9 previously presented, Petitioner asserts that the petition is not successive. Finally, Petitioner
10 requests an extension of sixty (60) days in which to file additional records to show that the
11 petition is not successive or untimely.

12 **I. DISCUSSION**

13 A court must dismiss a second or successive petition that raises the same grounds as
14 a prior petition. 28 U.S.C. § 2244(b)(1). A court must also dismiss a second or successive
15 petition raising a new ground unless the petitioner can show that 1) the claim rests on a new
16 constitutional right, made retroactive by the United States Supreme Court or 2) the factual
17 basis of the claim was not previously discoverable through due diligence, and these new facts
18 establish by clear and convincing evidence that but for the constitutional error, no reasonable
19 factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C. §
20 2244(b)(2)(A)-(B). However, it is not the district court that decides whether a second or
21 successive petition meets these requirements; the Petitioner must first file a motion with the
22 appropriate court of appeals to be authorized to file a second or successive petition with the
23 district court.

24 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted
25 by this section is filed in the district court, the applicant shall move in the appropriate court of
26 appeals for an order authorizing the district court to consider the application." In other words,

27
28 ¹Petitioner does admit that his claim in the current petition that trial counsel was ineffective for failing to
call an alibi witness was already presented in the earlier petition.

1 Petitioner must obtain leave from the Ninth Circuit before he can file a second or successive
2 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must
3 dismiss any second or successive petition unless the Court of Appeals has given Petitioner
4 leave to file the petition because a district court lacks subject-matter jurisdiction over a second
5 or successive petition. Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997).

6 Because the current petition was filed after April 24, 1996, the provisions of the
7 Antiterrorism and Effective Death Penalty Act of 1996 apply to Petitioner's current petition.
8 Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has obtained
9 prior leave from the Ninth Circuit to file his successive petition attacking the conviction. That
10 being so, this Court has no jurisdiction to consider Petitioner's renewed application for relief
11 under Section 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at 1277. If
12 Petitioner desires to proceed in bringing this petition for writ of habeas corpus, he must file for
13 leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244(b)(3).

14 **II. RECOMMENDATION**

15 Accordingly, the Court HEREBY RECOMMENDS the habeas corpus petition be
16 DISMISSED as successive. The Court further RECOMMENDS that Petitioner's request for an
17 extension of time to file further documents in support of his response to the order to show
18 cause be DENIED.

19 This Findings and Recommendation is submitted to the assigned United States District
20 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
21 Local Rules of Practice for the United States District Court, Eastern District of California.
22 Within thirty (30) days after the date of service of this Findings and Recommendation, any
23 party may file written objections with the Court and serve a copy on all parties. Such a
24 document should be captioned "Objections to Magistrate Judge's Findings and
25 Recommendation." Replies to the Objections shall be served and filed within fourteen (14)
26 days after service of the Objections. The Finding and Recommendation will then be submitted
27 to the District Court for review of the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
28 (b)(1)(c). The parties are advised that failure to file objections within the specified time may

1 waive the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th
2 Cir. 1991).

3
4 IT IS SO ORDERED.

5 Dated: October 2, 2011

1st. Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28