

1 petition, shows Petitioner has previously sought habeas relief with respect to this conviction.¹ In case
2 no. 1:07-cv-00436-MLH-CAB HC, Petitioner raised the following grounds for relief: (1) insufficient
3 evidence to convict Petitioner on the substantive charges; (2) improper merger in the substantive
4 convictions; (3) improper denial of a continuance; (4) improper response by the trial judge to a juror
5 query regarding punishment; (5) instructional error; and (6) cumulative error. On June 17, 2009, the
6 Court denied that petition on its merits and entered judgment against Petitioner. Subsequently, on
7 August 12, 2011, the United States Court of Appeals for the Ninth Circuit dismissed the appeal and
8 declined to issue a Certificate of Appealability. The Court's records indicate that, on review, the
9 United States Court of Appeals for the Ninth Circuit denied issuance of a certificate of appealability.

10 In the latest petition, Petitioner contends, in addition to his claims of ineffective assistance of
11 counsel, that "newly discovered evidence" in the form of Petitioner's disadvantaged childhood and
12 his mental and emotional problems should have been raised during trial proceedings, especially
13 during the hearing to dismiss one of the prior strikes and during his sentencing hearing. Petitioner
14 also contends that his petition is timely, or if untimely, should be excused for good cause, and that
15 the petition, though successive, should be allowed because he did not understand the claims raised in
16 the first petition, which had been prepared by another inmate, and because of the "newly discovered
17 evidence" referred to above.

18 DISCUSSION

19 A federal court must dismiss a second or successive petition that raises the same grounds as a
20 prior petition. 28 U.S.C. § 2244(b)(1). The Court must also dismiss a second or successive petition
21 raising a new ground unless the petitioner can show that 1) the claim rests on a new, retroactive,
22 constitutional right or 2) the factual basis of the claim was not previously discoverable through due
23 diligence, and these new facts establish by clear and convincing evidence that but for the
24 constitutional error, no reasonable fact-finder would have found the applicant guilty of the
25 underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court that decides

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27 ¹The Court takes judicial notice of the docket in case no. 1:02-cv-05251-REC-BAK HC. Fed. R. Evid. 201(b);
28 United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir.1993); Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 635 n.1
(N.D.Cal.1978), aff'd, 645 F.2d 699, (9th Cir.) (Judicial notice may be taken of court records).

1 whether a second or successive petition meets these requirements, which then allow a petitioner to
2 file a second or successive petition.²

3 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this
4 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an
5 order authorizing the district court to consider the application." *In other words, Petitioner must*
6 *obtain leave from the Ninth Circuit before he can file a second or successive petition in district*
7 *court. See Felker v. Turpin*, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or
8 successive petition unless the Court of Appeals has given Petitioner leave to file the petition *because*
9 *a district court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United*
10 *States*, 129 F.3d 54, 57 (1st Cir. 1997); *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir. 1997),
11 *cert. denied*, 117 S.Ct. 794 (1997); *Nunez v. United States*, 96 F.3d 990, 991 (7th Cir. 1996).

12 Because the current petition was filed after April 24, 1996, the provisions of the
13 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current
14 petition. *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has
15 obtained prior leave from the Ninth Circuit to file his successive petition attacking his 2003 Kern
16 County conviction. That being so, this Court has no jurisdiction to consider Petitioner's renewed
17 application for relief from that conviction under § 2254 and must dismiss the petition. See
18 *Greenawalt*, 105 F.3d at 1277; *Nunez*, 96 F.3d at 991. If Petitioner desires to proceed in bringing
19 this petition for writ of habeas corpus, he must first file for leave to do so with the Ninth Circuit.
20 See 28 U.S.C. § 2244 (b)(3).

21 **ORDER**

22 Accordingly, it is HEREBY ORDERED as follows:

- 23 1. The Clerk of the Court is DIRECTED to assign a United States District Judge to this
24 case.

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26 _____
27 ² This is where Petitioner's reasoning goes seriously awry. Petitioner makes various claims about why a second and
28 successive petition should be permitted. However, this Court has no authority to consider those reasons. Only the Ninth
Circuit can determine whether a second and successive petition should be allowed. Accordingly, Petitioner must make his
arguments to the Ninth Circuit, not this Court.

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RECOMMENDATION

Accordingly, IT IS HEREBY RECOMMENDED that the petition for writ of habeas corpus be DISMISSED as successive.

This Findings and Recommendation is submitted to the United States District Court Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within twenty (20) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: January 3, 2012

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE