



1 sentence should not have been enhanced by his 1995 conviction. In case no. 1:05-cv-01103-LJO-  
2 SMS, the Court fully addressed that issue on its merits and rejected it.<sup>1</sup>

### 3 DISCUSSION

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

11 However, it is not the district court that decides whether a second or successive petition meets  
12 these requirements that allow a petitioner to file a second or successive petition, but rather the Ninth  
13 Circuit. Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this  
14 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an  
15 order authorizing the district court to consider the application." In other words, Petitioner must obtain  
16 leave from the Ninth Circuit before he can file a second or successive petition in district court. See  
17 Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive  
18 petition unless the Court of Appeals has given Petitioner leave to file the petition because a district  
19 court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United States, 129  
20 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997), *cert. denied*,  
21 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

22 Because the current petition was filed after April 24, 1996, the provisions of the Antiterrorism  
23 and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. Lindh v.  
24 Murphy, 521 U.S. 320, 327 (1997). As mentioned above, the instant petition challenges the same  
25 conviction as Petitioner's prior petition in this court. However, Petitioner makes no showing that he  
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27 <sup>1</sup> Although Petitioner contends that the instant petition is based upon "newly discovered" evidence, the Court has searched  
28 the petition and attached documents in vain to find any evidence that could reasonably be characterized as new. To the  
contrary, all of the documents and evidence attached to the instant petition appear to predate the filing of the earlier petition  
in case no. 1:05-cv-01103-LJO-SMS.

1 has obtained prior leave from the Ninth Circuit to file this successive petition attacking his 2000  
2 conviction. That being so, this Court has no jurisdiction to consider Petitioner's renewed application  
3 for relief from that conviction under § 2254 and must dismiss the petition. See Greenawalt, 105 F.3d  
4 at 1277; Nunez, 96 F.3d at 991. If Petitioner desires to proceed in bringing this petition for writ of  
5 habeas corpus, he must first file for leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244 (b)(3).

6 **ORDER**

7 For the foregoing reasons, the Clerk of the Court is DIRECTED to assign a United States  
8 District judge to this case.

9 **RECOMMENDATION**

10 Accordingly, the Court RECOMMENDS that the Petition for Writ of Habeas Corpus be  
11 DISMISSED as a second and successive petition.

12 This Findings and Recommendation is submitted to the United States District Court Judge  
13 assigned to the case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
14 Rules of Practice for the United States District Court, Eastern District of California. Within twenty  
15 (20) days after being served with a copy of this Findings and Recommendation, any party may file  
16 written objections with the Court and serve a copy on all parties. Such a document should be captioned  
17 "Objections to Magistrate Judge's Findings and Recommendation." Replies to the Objections shall be  
18 served and filed within ten (10) court days (plus three days if served by mail) after service of the  
19 Objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636  
20 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the  
21 right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9<sup>th</sup> Cir. 1991).

22  
23 IT IS SO ORDERED.

24 Dated: May 30, 2013

/s/ Jennifer L. Thurston  
25 UNITED STATES MAGISTRATE JUDGE