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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

ANTONION P. PALOMINOS,)	Case No.: 1:13-cv-01796-JLT
Plaintiff,)	FINDINGS AND RECOMMENDATIONS TO
v.)	DISMISS PETITION FOR WRIT OF HABEAS
ROY E. BARNES,)	CORPUS AS SECOND AND SUCCESSIVE
Defendant.)	ORDER DIRECTING THAT OBJECTIONS BE
)	FILED WITHIN TWENTY-ONE DAYS
)	ORDER DIRECTING CLERK OF THE COURT TO
)	ASSIGN DISTRICT JUDGE TO CASE

Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

PROCEDURAL HISTORY

The instant petition was filed on October 8, 2013 in the Northern District of California and transferred to this Court on November 6, 2013. (Doc. 7). In the course of conducting a preliminary screening of the petition, it has come to the Court’s attention that Petitioner has previously filed one or more federal habeas petitions challenging this same conviction.

A review of the Court’s own docket reflects that Petitioner has previously filed a federal petition in this Court in case no. 1:09-cv-01682-AWI-BAM (“09-01682”), challenging the same conviction that is challenged in the instant petition, i.e., Petitioner’s 2007 conviction in the Madera County Superior Court for five counts of second degree murder and gross vehicular manslaughter while

1 intoxicated and his subsequent sentence of seventy-nine-year-to-life. In that case, Petitioner raised the
2 following issues: (1) sufficiency of the evidence of implied malice; and (2) improper hypothetical
3 question posed to expert. The Magistrate Judge issued Findings and Recommendations on January 27,
4 2012 to deny the petition on its merits. (Doc. 25 to case no. 09-01682). The District Judge adopted the
5 Findings and Recommendations and entered judgment on April 24, 2012. (Doc. 33 to case no. 09-
6 01682). Thereafter, Petitioner appealed his case to the Ninth Circuit, which, on June 27, 2012, denied
7 Petitioner's request for issuance of a certificate of appealability. (Doc. 39 to case no. 09-01682).

8 DISCUSSION

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

15 However, it is not the district court that decides whether a second or successive petition meets
16 these requirements that allow a petitioner to file a second or successive petition, but rather the Ninth
17 Circuit. Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this
18 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an
19 order authorizing the district court to consider the application." In other words, Petitioner must obtain
20 leave from the Ninth Circuit before he may file a second or successive petition in district court. See
21 Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive
22 petition unless the Court of Appeals has given Petitioner leave to file the petition because a district
23 court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United States, 129
24 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997), *cert. denied*,
25 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

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¹ In the instant petition, Petitioner raises "new" grounds, i.e., (1) illegal sentence; and, (2) ineffective assistance of trial
counsel. However, as discussed above, the question of whether Petitioner can file a successive petition that raises new
issues is one for the Ninth Circuit, not this Court.

