

1 no. 04-6349 was dismissed as untimely on September 27, 2005. (Case no. 04-6349, Docs. 25 & 26).
2 Petitioner subsequently appealed to the United States Court of Appeals, Ninth Circuit, which denied a
3 certificate of appealability on January 23, 2006. (Id., Doc. 31).

4 DISCUSSION

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

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

23 Because the current petition was filed after April 24, 1996, the provisions of the Antiterrorism
24 and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. Lindh v.
25 Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has obtained prior leave from
26 the Ninth Circuit to file this successive petition attacking his conviction. That being so, this Court has
27 no jurisdiction to consider Petitioner's renewed application for relief from that 1997 conviction under
28 § 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991. *If*

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

3 **ORDER**

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

6 **RECOMMENDATION**

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

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

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20 IT IS SO ORDERED.

21 Dated: April 24, 2014

22 /s/ Jennifer L. Thurston
23 UNITED STATES MAGISTRATE JUDGE
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