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

GERALD L. TUCKER,  
  
                    Plaintiff,  
  
                    v.  
  
DANIEL PARAMO,  
  
                    Defendant.

) Case No.: 1:15-cv-00829-JLT  
)  
) FINDINGS AND RECOMMENDATIONS TO  
) DISMISS PETITION FOR WRIT OF HABEAS  
) CORPUS AS SECOND AND SUCCESSIVE  
)  
) ORDER DIRECTING THAT OBJECTIONS BE  
) FILED WITHIN TWENTY-ONE DAYS  
)  
) ORDER DIRECTING CLERK OF THE COURT TO  
) ASSIGN DISTRICT JUDGE TO CASE  
)

In the course of conducting a preliminary screening of this petition, the Court has determined that Petitioner previously filed at least two federal habeas petitions challenging this same conviction.

In case no. 1:04-cv-05662-OWW-DLB, the petition was denied on its merits. This petition challenged the same conviction Petitioner attacks in this petition. Again, in case no. 1:13-cv-01534-AWI-BAM, Petitioner challenged the same conviction and that petition was denied as successive.

**I. DISCUSSION**

**A. Preliminary Review of Petition.**

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . . .” Rule 4 of the Rules Governing Section 2254 Cases. The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas

1 corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after  
2 an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9<sup>th</sup> Cir.2001).

3 B. Successive Petitions. [§ 2254]

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 discussed above, Petitioner has twice before filed petitions in  
25 this court seeking to challenge the same conviction as that in the instant petition. On the first  
26 occasion, the petition was denied on the merits. On the second occasion, it was denied as successive.  
27 Here, Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file this  
28 successive petition attacking his conviction. That being so, this Court has no jurisdiction to consider

1 Petitioner's renewed application for relief from that conviction under § 2254 and must dismiss the  
2 petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991. If Petitioner desires to proceed in  
3 bringing this petition for writ of habeas corpus, he **must first file for leave to do so with the Ninth**  
4 **Circuit**. See 28 U.S.C. § 2244 (b)(3).

5 **ORDER**

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

8 **RECOMMENDATION**

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

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

21  
22 IT IS SO ORDERED.

23 Dated: June 16, 2015

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