



1 The Court's docket reflects that Petitioner has previously filed petitions with the following  
2 case numbers: no. 1:01-cv-06120-OWW-SMS; no. 1:05-cv-00949-OWW-SMS; no. 1:06-cv-00320-  
3 OWW-SMS; no. 1:09-cv-00765-OWW-SMS; no. 2:10-cv-00925-LKK-KJM; no. 2:10-cv-03478-  
4 GGH; no. 1:14-01990-LJO-SAB; no. 2:14-cv-01249-KJM-KJN. All of these petitions challenged the  
5 same 1980 conviction for the same reasons. All were dismissed either as untimely or successive.

## 6 **II. DISCUSSION**

### 7 A. Procedural Grounds for Motion to Dismiss

8 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition  
9 if it "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is  
10 not entitled to relief in the district court . . . ." Rule 4 of the Rules Governing Section 2254 Cases. The  
11 Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas  
12 corpus, either on its own motion under Rule 4, pursuant to the respondent's motion to dismiss, or after  
13 an answer to the petition has been filed. Herbst v. Cook, 260 F.3d 1039 (9<sup>th</sup> Cir.2001).

### 14 B. Successive Petitions.

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

22 However, it is not the district court that decides whether a second or successive petition meets  
23 these requirements that allow a petitioner to file a second or successive petition, but rather the Ninth  
24 Circuit. Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this  
25 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an  
26 order authorizing the district court to consider the application." In other words, Petitioner must obtain  
27 leave from the Ninth Circuit before he can file a second or successive petition in district court. See  
28 Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive

1 petition unless the Court of Appeals has given Petitioner leave to file the petition because a district  
2 court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United States, 129  
3 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997), *cert. denied*,  
4 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

5 Because the current petition was filed after April 24, 1996, the provisions of the Antiterrorism  
6 and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. Lindh v.  
7 Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has obtained prior leave from  
8 the Ninth Circuit to file this successive petition attacking his conviction. That being so, this Court has  
9 no jurisdiction to consider Petitioner's renewed application for relief from that conviction under §  
10 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991. If  
11 Petitioner desires to proceed in bringing this petition for writ of habeas corpus, he must first file for  
12 leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244 (b)(3).

### 13 ORDER

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

### 16 RECOMMENDATION

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

19 This Findings and Recommendation is submitted to the United States District Court Judge  
20 assigned to the case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
21 Rules of Practice for the United States District Court, Eastern District of California. **Within 21 days**  
22 after being served with a copy of this Findings and Recommendation, any party may file written  
23 objections with the Court and serve a copy on all parties. Such a document should be captioned  
24 "Objections to Magistrate Judge's Findings and Recommendation." Replies to the Objections shall be  
25 served and filed **within 10 days** after service of the Objections. The Court will then review the  
26 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C).

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