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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

**MALCOM P. COLEMAN,**  
Petitioner,  
  
v.  
  
**S. HATTON, Warden,**  
Respondent.

Case No. 1:16-cv-01781 MJS (HC)

**FINDINGS AND RECOMMENDATION TO  
DISMISS SUCCESSIVE PETITION FOR  
WRIT OF HABEAS CORPUS PURSUANT  
TO 28 U.S.C. § 2244(b)**

**ORDER DIRECTING CLERK OF COURT  
TO ASSIGN DISTRICT COURT JUDGE TO  
THE PRESENT MATTER**

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus under 28 U.S.C. § 2254.

In the petition filed on November 23, 2016, Petitioner challenges a January 10, 1999 conviction in the Superior Court of California, County of Kern for two counts of rape, forceable oral copulation, kidnapping, and various enhancements. Petitioner was sentenced to an indeterminate state prison term of twenty-five (25) years to life.

A review of the Court’s dockets and files shows Petitioner has previously sought habeas relief with respect to this conviction. In case number 1:03-cv-05780-DLB (HC), Petitioner challenged the same underlying conviction. On September 13, 2005, the

1 petition was denied on the merits. Petitioner filed a second federal habeas petition on  
2 March 23, 2009. See E.D. Cal. Case No. 1:09-cv-00546-AWI-DLB (HC). The petition  
3 was dismissed as successive on December 8, 2009.

#### 4 **I. Discussion**

5 A court must dismiss a second or successive petition that raises the same  
6 grounds as a prior petition. 28 U.S.C. § 2244(b)(1). A court must also dismiss a second  
7 or successive petition raising a new ground unless the petitioner can show that 1) the  
8 claim rests on a new constitutional right, made retroactive by the United States Supreme  
9 Court or 2) the factual basis of the claim was not previously discoverable through due  
10 diligence, and these new facts establish by clear and convincing evidence that but for  
11 the constitutional error, no reasonable factfinder would have found the applicant guilty of  
12 the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court  
13 that decides whether a second or successive petition meets these requirements; the  
14 Petitioner must first file a motion with the appropriate court of appeals to be authorized to  
15 file a second or successive petition with the district court.

16 Section 2244 (b)(3)(A) provides: "Before a second or successive application  
17 permitted by this section is filed in the district court, the applicant shall move in the  
18 appropriate court of appeals for an order authorizing the district court to consider the  
19 application." In other words, Petitioner must obtain leave from the Ninth Circuit before he  
20 can file a second or successive petition in district court. See Felker v. Turpin, 518 U.S.  
21 651, 656-657 (1996). This Court must dismiss any second or successive petition unless  
22 the Court of Appeals has given Petitioner leave to file the petition because a district court  
23 lacks subject-matter jurisdiction over a second or successive petition. Greenawalt v.  
24 Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997).

25 Because the current petition was filed after April 24, 1996, the provisions of the  
26 Antiterrorism and Effective Death Penalty Act of 1996 apply to Petitioner's current  
27 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that  
28 he has obtained prior leave from the Ninth Circuit to file his successive petition attacking

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

6 **II. Order and Recommendation**

7 The Court RECOMMENDS that the petition for writ of habeas corpus be  
8 DISMISSED as successive. Further, the Court ORDERS the Clerk of Court to assign a  
9 District Court judge to the instant matter.

10 These findings and recommendations are submitted to the United States District  
11 Court Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636  
12 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court,  
13 Eastern District of California. Within thirty (30) days after being served with a copy, any  
14 party may file written objections with the Court and serve a copy on all parties. Such a  
15 document should be captioned "Objections to Magistrate Judge's Findings and  
16 Recommendations." Replies to the objections shall be served and filed within fourteen  
17 (14) days (plus three days if served by mail) after service of the objections. The Court  
18 will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(c).

19 The parties are advised that failure to file objections within the specified time may  
20 waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834,  
21 839 (9th Cir. 2014).

22  
23 IT IS SO ORDERED.

24 Dated: November 28, 2016

/s/ Michael J. Seng  
25 UNITED STATES MAGISTRATE JUDGE