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

JOSE DE JESUS HERNANDEZ,

Petitioner,

v.

M. E. SPEARMAN,

Respondent.

Case No. 1:17-cv-01625-JLT (HC)

FINDINGS AND RECOMMENDATION TO  
DISMISS SUCCESSIVE PETITION FOR  
WRIT OF HABEAS CORPUS

ORDER DIRECTING CLERK OF COURT  
TO ASSIGN DISTRICT JUDGE

[TWENTY-ONE DAY OBJECTION  
DEADLINE]

On December 1, 2017, Petitioner filed the instant petition for writ of habeas corpus in this Court. Because the petition is successive, the Court will recommend it be **DISMISSED**.

**PROCEDURAL BACKGROUND**

On September 26, 2007, Petitioner was convicted in the Tulare County Superior Court of: first degree felony murder with a robbery/burglary special circumstance; attempted murder of a peace officer with a special allegation that the offense occurred while the officer was engaged in the performance of his duties; four counts of second degree robbery with personal use of a firearm; three counts of second degree commercial burglary; conspiracy to commit robbery; unlawfully taking or driving a vehicle; and receiving a stolen vehicle. He is serving a sentence of life without the possibility of parole.

The instant petition challenges the 2007 conviction and raises the following claims for

1 relief: 1) Ineffective assistance of counsel due to failure to raise claims on appeal; 2) Evidence  
2 was insufficient to support the conviction for first degree felony murder; 3) An ambiguous jury  
3 instruction on felony murder unconstitutionally relieved the state of its burden of proof of an  
4 element of the crime; 4) The evidence does not support a finding that the attempted murder is a  
5 reasonably foreseeable natural and probable consequence; 5) The trial court's denial to continue  
6 the trial violated Petitioner's due process rights and his right to prepare a defense for trial; and 6)  
7 The court imposed an illegal and excessive restitution fine.

8 The instant petition is not Petitioner's first federal petition. On February 25, 2010,  
9 Petitioner filed a federal petition for writ of habeas corpus in this Court challenging the same  
10 conviction. See Hernandez v. New Folsom State Prison Warden, Case No.: 1:10-cv-00391-LJO-  
11 JLT (HC). The District Court denied the petition on the merits on May 11, 2012. Petitioner  
12 appealed to the Ninth Circuit Court of Appeals on May 30, 2012, and the appellate court denied  
13 the appeal on July 25, 2013.

#### 14 DISCUSSION

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

23 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by  
24 this section is filed in the district court, the applicant shall move in the appropriate court of  
25 appeals for an order authorizing the district court to consider the application." In other words,  
26 Petitioner must obtain leave from the Ninth Circuit before he can file a second or successive  
27 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must  
28 dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave

1 to file the petition because a district court lacks subject-matter jurisdiction over a second or  
2 successive petition. Burton v. Stewart, 549 U.S. 147, 152 (2007); Cooper v. Calderon, 274 F.3d  
3 1270, 1274 (9<sup>th</sup> Cir. 2001).

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

11 **ORDER**

12 Accordingly, the Clerk of Court is DIRECTED to assign a District Judge to this case.

13 **RECOMMENDATION**

14 For the foregoing reasons, the Court RECOMMENDS that the petition be DISMISSED  
15 as successive.

16 This Findings and Recommendation is submitted to the United States District Court  
17 Judge assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and  
18 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of  
19 California. Within twenty-one days after being served with a copy, Petitioner may file written  
20 objections with the Court. Such a document should be captioned "Objections to Magistrate  
21 Judge's Findings and Recommendation." The Court will then review the Magistrate Judge's  
22 ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections  
23 within the specified time may waive the right to appeal the District Court's order. Martinez v.  
24 Ylst, 951 F.2d 1153 (9th Cir. 1991).

25 IT IS SO ORDERED.  
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27 Dated: December 11, 2017

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE

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