

1 constitutional right or 2) the factual basis of the claim was not previously discoverable through due
2 diligence, and these new facts establish by clear and convincing evidence that but for the constitutional
3 error, no reasonable factfinder would have found the applicant guilty of the underlying offense. 28
4 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court that decides whether a second or
5 successive petition meets these requirements.

6 Section 2244(b)(3)(A) provides: “Before a second or successive application permitted by this
7 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an
8 order authorizing the district court to consider the application.” In other words, Petitioner must obtain
9 leave from the Ninth Circuit before he can file a second or successive petition in district court. See
10 Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive
11 petition unless the Court of Appeals has given Petitioner leave to file the petition because a district
12 court lacks subject-matter jurisdiction over a second or successive petition. Burton v. Stewart, 549
13 U.S. 147, 152 (2007); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001).

14 Petitioner challenges his 2003 conviction for attempted murder with the use of a firearm,
15 raising claims including, among other things, that his counsel was ineffective and the trial court erred
16 in denying his motion to continue his trial. (See Doc. 1.) Petitioner previously sought federal habeas
17 relief in this Court with respect to the same conviction numerous times. See Lupercio v. Gonzalez, No.
18 1:08-cv-00012-LJO-JLT (dismissed as untimely); Lupercio v. Sherman, No. 1:15-cv-00915-DAD-
19 MJS (dismissed as successive); Lupercio v. Sherman, No. 1:15-cv-01834-DAD-MJS (same); Lupercio
20 v. Sherman, No. 1:16-cv-00233-DAD-MJS (same); Lupercio v. People of the State of California, No.
21 1:20-cv-00925-DAD-JDP (same).¹

22 The Court finds that the instant petition is “second or successive” under 28 U.S.C. § 2244(b).
23 See McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding “dismissal of a first habeas
24 petition for untimeliness presents a ‘permanent and incurable’ bar to federal review of the underlying
25 claims,” and thus renders subsequent petitions “second or successive”). Petitioner makes no showing
26 that he has obtained prior leave from the Ninth Circuit to file his successive petition. Therefore, this

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28 ¹ The Court may take judicial notice of its own records in other cases. United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

1 Court has no jurisdiction to consider Petitioner’s renewed application for relief under 28 U.S.C. §
2 2254 and must dismiss the petition. See Burton, 549 U.S. at 157.

3 **ORDER**

4 Accordingly, the Court DIRECTS the Clerk of Court to assign a district judge to the case.

5 **RECOMMENDATION**

6 For the foregoing reasons, the Court RECOMMENDS that the petition be DISMISSED as
7 successive.

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

16
17 IT IS SO ORDERED.

18 Dated: March 12, 2021

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE