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

ERNIE ROXAS,

No. 2:15-CV-2201-CMK-P

Petitioner,

vs.

FINDINGS AND RECOMMENDATIONS

J. LIZARRAGA,

Respondent.

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Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondent’s motion to dismiss (Doc. 12).

Respondent argues that the instant petitioner is a second of successive petition which must be dismissed. Under 28 U.S.C. § 2244(b)(1), “[a] claim presented in a second or successive habeas corpus application . . . that was presented in a prior application shall be dismissed.” Under § 2244(b)(2), “[a] claim presented in a second or successive habeas corpus application . . . that was not presented in a prior application shall be dismissed. . . .” unless one of two circumstances exist. Either the newly raised claim must rely on a new rule of constitutional law, or the factual predicate of the new claim could not have been discovered earlier through the

1 exercise of due diligence and the new claim, if proven, establishes actual innocence. See id.
2 Before a second or successive petition can be filed in the district court, however, the petitioner
3 must first obtain leave of the Court of Appeals. See 28 U.S.C. § 2244(b)(3). In the absence of
4 proper authorization from the Court of Appeals, the district court lacks jurisdiction to consider a
5 second or successive petition and must dismiss it. See Cooper v. Calderon, 274 F.3d 1270 (9th
6 Cir. 2001) (per curiam).

7 A second petition can only be successive of a prior petition which has been
8 decided on the merits. Woods v. Carey, 525 F.3d 886, 888 (9th Cir. 2008). A decision on the
9 merits occurs if the district court either considers and rejects the claims or determines that the
10 claims will not be considered by a federal court. See Howard v. Lewis, 905 F.2d 1318, 1322-23
11 (9th Cir. 1990). Where a prior petition has been dismissed without prejudice for failure to
12 exhaust state court remedies, the dismissal does not result in an adjudication on the merits
13 because the possibility of returning to court following exhaustion exists and a habeas petition
14 filed in the district court after the initial petition was dismissed is not second or successive. See
15 Slack v. McDaniel, 529 U.S. 473, 485-86 (2000). The dismissal of a petition as untimely,
16 however, does constitute a decision on the merits because such a dismissal is a determination that
17 the claims will not be considered. See McNabb v. Yates, 576 F.3d 1028, 1029-30 (9th Cir.
18 2009). Likewise, the denial of a petition on procedural default grounds is also a determination
19 on the merits. See Henderson v. Lampert, 396 F.3d 1049, 1053 (9th Cir. 2005) (citing Howard,
20 905 F.2d at 1322-23, and stating that the denial of a petition on procedural default grounds is a
21 determination that the claims will not be considered by the federal court).

22 The court agrees with respondent that the instant petition is a second or successive
23 petition. Petitioner filed a prior federal habeas petition on October 1, 2010, Roxas v. Montal,
24 2:10-CV-2672-WBS-TJB-P, challenging a September 7, 2007, conviction in San Joaquin
25 County. Judgement in the 2010 federal petition was entered on August 15, 2012, and the Ninth
26 Circuit Court of Appeals declined to issue a certificate of appealability. A review of both

1 dockets reflects that the claims raised in the current federal petition were all raised in the 2010
2 federal petition. As such, the current petition must be dismissed under § 2244(b)(1). To the
3 extent the current petition can be seen as presenting claims which were not decided on the merits
4 in the 2010 action, petitioner has not obtained leave from the Ninth Circuit to present such
5 claims in a second or successive petition. Thus, the current petition must also be dismissed
6 under § 2244(b)(3).

7 Because the court lacks jurisdiction to consider the current second or successive
8 petition, it is not necessary to address respondent's alternative argument that the instant petition
9 is untimely.

10 Based on the foregoing, the undersigned recommends that respondent's motion to
11 dismiss (Doc. 12) be granted.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
14 after being served with these findings and recommendations, any party may file written
15 objections with the court. Responses to objections shall be filed within 14 days after service of
16 objections. Failure to file objections within the specified time may waive the right to appeal.
17 See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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19 DATED: July 20, 2016

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21 **CRAIG M. KELLISON**
22 UNITED STATES MAGISTRATE JUDGE
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