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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

LEROY E. KENDALL,  
Petitioner,  
v.  
CYNTHIA TAMPKINS,  
Respondent.

No. 1:16-cv-00659-AWI-SKO HC  
**FINDINGS AND RECOMMENDATION  
TO DISMISS PETITION AS UNTIMELY  
AND SECOND OR SUCCESSIVE**  
**(Doc. 11)**

Petitioner Leroy E. Kendall is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent Cynthia Tampkins moves to dismiss the petition, contending that it is (1) untimely; (2) successive; and (3) unexhausted. Because the petition is both untimely and second or successive, the undersigned recommends that the Court dismiss the petition for lack of jurisdiction and not address Respondent’s detailed analysis of why the petition is unexhausted.

**I. Factual and Procedural Background**

A Kern County Superior Court jury convicted Petitioner of second degree attempted murder, assault with a deadly weapon, inflicting corporal injury on a spouse, and battery on a  
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1 spouse, and found multiple sentencing enhancements to be true. On August 9, 2010, the trial  
2 court sentenced Petitioner to a determinate sentence of thirteen years.

3 Petitioner filed a direct appeal to the California Court of Appeal, which affirmed the  
4 judgment on September 26, 2012. The California Supreme Court denied two petitions for review  
5 on January 16, 2013. Petitioner filed no post-conviction collateral challenges in state court.  
6

7 On February 8, 2013, Petitioner filed a petition for writ of habeas corpus pursuant to 28  
8 U.S.C. § 2254. *Kendall v. Tampkins* (1:13-cv-00209-LJO-JLT HC). This Court denied the  
9 petition on October 30, 2015. Petitioner filed a second § 2254 petition on January 25, 2016.  
10 *Kendall v. Tampkins* (1:16-cv-00659-DAD-MJS HC). On May 4, 2016, the Court denied the  
11 petition as a second or successive petition. On May 11, 2016, Petitioner filed the above-  
12 captioned petition.  
13

## 14 **II. Second or Successive Petition**

15 Because Petitioner filed this petition after April 24, 1996, the provisions of the  
16 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply. *Lindh v. Murphy*, 521  
17 U.S. 320, 327 (1997). When AEDPA applies, a federal court must dismiss a second or successive  
18 petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The court must  
19 also dismiss a second or successive petition raising a new ground unless the petitioner can show  
20 that (1) the claim rests on a new retroactive constitutional right, or (2) the factual basis of the  
21 claim was not previously discoverable through due diligence, and the new facts establish, by clear  
22 and convincing evidence, that but for the constitutional error, no reasonable factfinder would have  
23 found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A) and (B).  
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25 The circuit court of appeals, not the district court, must decide whether a second or  
26 successive petition satisfies the statutory requirements to proceed. 28 U.S.C. §2244(b)(3)(A)  
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1 ("Before a second or successive petition permitted by this section is filed in the district court, the  
2 applicant shall move in the appropriate court of appeals for an order authorizing the district court  
3 to consider the application"). This means that a petitioner may not file a second or successive  
4 petition in district court until he has obtained leave from the court of appeals. *Felker v. Turpin*,  
5 518 U.S. 651, 656-57 (1996). In the absence of an order from the appropriate circuit court, a  
6 district court lacks jurisdiction over the petition and must dismiss the second or successive  
7 petition. *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9<sup>th</sup> Cir. 1997).

9 Petitioner presents no indication that he has obtained an order from the Ninth Circuit  
10 authorizing the filing of yet another successive petition attacking the 1998 judgment of  
11 resentencing. As a result, this Court lacks jurisdiction to consider the petition and must dismiss  
12 it. *See Greenawalt*, 105 F.3d at 1277.

13  
14 **III. Timeliness of the Pending Petition**

15 AEDPA provides a one-year period of limitation in which a petitioner may file a petition  
16 for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). The limitations period is measured from the  
17 latest of:

18  
19 (A) the date on which the judgment became final by conclusion  
20 of direct review or the expiration of the time for seeking such  
review;

21 (B) the date on which the impediment to filing a State action in  
22 violation of the Constitution or laws of the United States is  
removed, if the applicant was prevented from filing by such state  
action;

23 (C) the date on which the constitutional right asserted was  
24 initially recognized by the Supreme Court and made retroactively  
applicable to cases on collateral review; or

25 (D) the date on which the factual predicate of the claim or  
26 claims presented could have been discovered through the exercise  
of due diligence.

27 28 U.S.C. § 2244(d)(1).  
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2 In this case, direct review in the State of California ended January 16, 2013, when the  
3 California Supreme Court denied review. The federal statutory limitation period began on  
4 February 26, 2013, following the expiration of the 40-day period in which to seek review in the  
5 California Supreme Court. Accordingly, the one-year statutory limitation period expired on  
6 February 27, 2014. Even if this action were not barred as a second or successive petition, the  
7 above-captioned petition, filed May 11, 2016, would be barred as untimely.

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9 **IV. Certificate of Appealability**

10 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a  
11 district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v.*  
12 *Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a  
13 certificate of appealability is 28 U.S.C. § 2253, which provides:

14 (a) In a habeas corpus proceeding or a proceeding under section 2255  
15 before a district judge, the final order shall be subject to review, on appeal, by  
16 the court of appeals for the circuit in which the proceeding is held.

17 (b) There shall be no right of appeal from a final order in a proceeding  
18 to test the validity of a warrant to remove to another district or place for  
19 commitment or trial a person charged with a criminal offense against the  
20 United States, or to test the validity of such person's detention pending  
21 removal proceedings.

22 (c) (1) Unless a circuit justice or judge issues a certificate of  
23 appealability, an appeal may not be taken to the court of appeals from—

24 (A) the final order in a habeas corpus proceeding in which the  
25 detention complained of arises out of process issued by a State court; or

26 (B) the final order in a proceeding under section 2255.

27 (2) A certificate of appealability may issue under paragraph (1)  
28 only if the applicant has made a substantial showing of the denial of a  
constitutional right.

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(3) The certificate of appealability under paragraph (1) shall indicate which specific issues or issues satisfy the showing required by paragraph (2).

If a court denies a habeas petition, the court may only issue a certificate of appealability "if jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Although the petitioner is not required to prove the merits of his case, he must demonstrate "something more than the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, 537 U.S. at 338.

Reasonable jurists would not find the Court's determination that it lacks jurisdiction to consider the above-captioned habeas petition to be debatable or wrong. Accordingly, the Court should decline to issue a certificate of appealability.

**V. Conclusion and Recommendation**

The undersigned RECOMMENDS that the Court dismiss the petition for writ of habeas corpus for lack of jurisdiction, enter judgment for Respondent, and decline to issue a certificate of appealability.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty (30) days** after being served with these Findings and Recommendations, either party may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Replies to the objections, if any, shall be served and filed within **fourteen (14) days** after service of the objections. The parties are advised that failure to file objections within the specified time may constitute waiver of the right to appeal the District

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Court's order. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 ((9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: November 4, 2016

*/s/ Sheila K. Oberto*  
UNITED STATES MAGISTRATE JUDGE