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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

GERARDO LUCIANO TAPIA,	)	Case No. CV 17-00525-ODW (AS)
	)	
Petitioner,	)	<b>ORDER OF DISMISSAL</b>
	)	
v.	)	
	)	
UNITED STATES DISTRICT COURT,	)	
CENTRAL DISTRICT OF	)	
CALIFORNIA,	)	
	)	
Respondent.	)	

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**I. BACKGROUND**

On March 21, 2017, Gerardo Luciano Tapia ("Petitioner"), a California state prisoner proceeding pro se, filed a "Petition for Writ of Mandate/Prohibition" ("Petition") (Docket Entry No. 1), which the Court construes as a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). Petitioner challenges his 2010 convictions for seven counts of committing a lewd and lascivious act on a child

1 under age fourteen by force, violence, duress, menace or fear and  
2 one count of attempted aggravated sexual assault of a child under  
3 age fourteen, in Riverside County Superior Court (Case No.  
4 RIF150883).<sup>1</sup> The Petition appears to allege the following grounds  
5 for federal habeas relief: (1) Petitioner's convictions were  
6 based on the lies by Petitioner's stepdaughter, a minor; (2)  
7 Petitioner received ineffective assistance of counsel based on  
8 trial counsel's failure to call Petitioner's wife to testify; (3)  
9 The trial court committed judicial misconduct in its response to  
10 the jurors' question about what happens if the jurors are not  
11 able to reach a verdict; (4) Petitioner is actually or factually  
12 innocent; (5) The polygraph evidence presented at trial was  
13 fabricated; and (6) Petitioner received ineffective assistance of  
14 counsel based on his trial counsel's failure to object to the  
15 trial court's judicial misconduct in its response to the  
16 jurors' question about what happens if the jurors are not able to  
17 reach a verdict.<sup>2</sup> (Petition, attached "Statement of the facts"  
18 at 2-7).<sup>3</sup>

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20 <sup>1</sup> The Court takes judicial notice of the pleadings in  
21 Gerardo Luciano Tapia v. Kim Holland, Warden, Case No. EDCV 14-  
01692-ODW (RNB).

22 <sup>2</sup> Petitioner admits he alleged this last claim in his  
23 2014 federal habeas petition.

24 <sup>3</sup> To the extent that Petitioner is attempting to seek  
25 relief from Judgment in Case No. EDCV 14-01692-ODW (RNB) under  
26 Rule 60(b)(6), Petitioner has failed to show extraordinary  
27 circumstances justifying the reopening of a final judgment. See  
28 Gonzalez v. Crosby, 545 U.S. 524, 536 (2005); LaFarge Conseils et  
Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1338  
(9th Cir. 1986) (citations omitted); see also Lehman v. United  
States, 154 F.3d 1010, 1017 (9th Cir. 1998) ("To receive Rule  
60(b)(6) relief, a moving party must show both injury and that  
circumstances beyond [his or her] control prevented timely action

1 On August 15, 2014, Petitioner filed a Petition for Writ of  
2 Habeas Corpus by a Person in State Custody by a Person in State  
3 Custody pursuant to 28 U.S.C. § 2254, in which he challenged the  
4 same 2010 convictions ("prior habeas action"). See Gerardo  
5 Luciano Tapia v. Kim Holland, Warden, Case No. EDCV 14-01692-ODW  
6 (RNB) (Docket Entry No. 1). On April 21, 2015, the Court issued  
7 an Order and Judgment denying that habeas petition and dismissing  
8 the action with prejudice, in accordance with the findings and  
9 recommendations of the assigned Magistrate Judge. (Id.; Docket  
10 Entry Nos. 25-26). On the same date, the Court denied Petitioner  
11 a certificate of appealability. (Id.; Docket Entry No. 24).

## 12 13 **II. DISCUSSION**

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15 The Antiterrorism and Effective Death Penalty Act of 1996  
16 ("AEDPA"), enacted on April 24, 1996, provides in pertinent part  
17 that:

18  
19 (a) No circuit or district judge shall be  
20 required to entertain an application for a writ of  
21 habeas corpus to inquire into the detention of a  
22 person pursuant to a judgment of a court of the  
23 United States if it appears that the legality of such  
24 detention has been determined by a judge or court of  
25 the United States on a prior application for a writ  
26 of habeas corpus, except as provided in §2255.

27 \_\_\_\_\_  
28 to protect [his or her] interests.").

1 (b) (1) A claim presented in a second or  
2 successive habeas corpus application under section  
3 2254 that was presented in a prior application shall  
4 be dismissed.

5 (2) A claim presented in a second or successive  
6 habeas corpus application under section 2254 that was  
7 not presented in a prior application shall be  
8 dismissed unless--

9 (A) the applicant shows that the claim relies on  
10 a new rule of constitutional law, made retroactive to  
11 cases on collateral review by the Supreme Court, that  
12 was previously unavailable; or

13 (B) (i) the factual predicate for the claim could  
14 not have been discovered previously through the  
15 exercise of due diligence; and

16 (ii) the facts underlying the claim, if proven  
17 and viewed in light of the evidence as a whole, would  
18 be sufficient to establish by clear and convincing  
19 evidence that, but for constitutional error, no  
20 reasonable fact finder would have found the applicant  
21 guilty of the underlying offense.

22 (3) (A) Before a second or successive application  
23 permitted by this section is filed in the district  
24 court, the applicant shall move in the appropriate  
25 court of appeals for an order authorizing the  
26 district court to consider the application.

27 (B) A motion in the court of appeals for an  
28 order authorizing the district court to consider a

1 second or successive application shall be determined  
2 by a three-judge panel of the court of appeals.

3 (C) The court of appeals may authorize the  
4 filing of a second or successive application only if  
5 it determines that the application makes a prima  
6 facie showing that the application satisfies the  
7 requirements of this subsection.

8 (D) The court of appeals shall grant or deny the  
9 authorization to file a second or successive  
10 application not later than 30 days after the filing  
11 of the motion.

12 (E) The grant or denial of an authorization by  
13 a court of appeals to file a second or successive  
14 application shall not be appealable and shall not be  
15 the subject of a Petition for Rehearing or for a Writ  
16 of Certiorari.

17 (4) A district court shall dismiss any claim  
18 presented in a second or successive application that  
19 the court of appeals has authorized to be filed  
20 unless the applicant shows that the claim satisfies  
21 the requirements of this section. 28 U.S.C. § 2244.  
22

23 28 U.S.C. § 2244(b)(3) "creates a 'gatekeeping' mechanism for  
24 the consideration of second or successive applications in district  
25 court. The prospective applicant must file in the court of  
26 appeals a motion for leave to file a second or successive habeas  
27 application in the district court. § 2244(b)(3)(A)." Felker v.  
28 Turpin, 518 U.S. 651, 657(1996).

1 The instant Petition and the prior habeas action both  
2 challenge Petitioner's custody pursuant to the same 2010 judgment  
3 entered by the Riverside County Superior Court. Accordingly, the  
4 instant Petition, filed on March 21, 2017, well after the  
5 effective date of the AEDPA, is a second or successive habeas  
6 petition for purposes of 28 U.S.C. § 2244. Therefore, Petitioner  
7 was required to obtain authorization from the Court of Appeals  
8 before filing the present Petition. See 28 U.S.C. §2244(b)(3)(A).  
9 No such authorization has been obtained in this case.

10  
11 Moreover, the claims asserted in the instant Petition do not  
12 appear to fall within the exceptions to the bar on second or  
13 successive petitions because the asserted claims are not based on  
14 newly discovered facts or a "a new rule of constitutional law,  
15 made retroactive to cases on collateral review by the Supreme  
16 Court, that was previously unavailable." Tyler v. Cain, 533 U.S.  
17 656, 662 (2001). However, this determination must be made by the  
18 United States Court of Appeals upon a petitioner's motion for an  
19 order authorizing the district court to consider his second or  
20 successive petition. 28 U.S.C. § 2244(b); see also Burton v.  
21 Stewart, 549 U.S. 147, 157 (2007) (where the petitioner did not  
22 receive authorization from the Court of Appeals before filing  
23 second or successive petition, "the District Court was without  
24 jurisdiction to entertain [the petition]"); Barapind v. Reno, 225  
25 F.3d 1100, 1111 (9th Cir. 2000) ("[T]he prior-appellate-review  
26 mechanism set forth in § 2244(b) requires the permission of the  
27 court of appeals before 'a second or successive habeas application  
28 under § 2254' may be commenced."). Because Petitioner has not

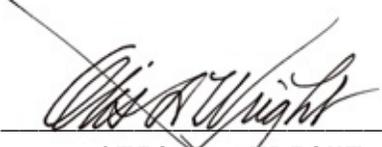
1 obtained authorization from the Ninth Circuit Court of Appeals,  
2 this Court cannot entertain the present Petition. See Burton v.  
3 Stewart, supra.

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5 **III. ORDER**

6  
7 ACCORDINGLY, IT IS ORDERED that the Petition be dismissed  
8 without prejudice.

9  
10 LET JUDGMENT BE ENTERED ACCORDINGLY.

11  
12 DATED: March 24, 2017

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15 OTIS D. WRIGHT, II  
16 UNITED STATES DISTRICT JUDGE  
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