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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

KHADIJAH GHAFUR,

1:12-CV-01460 GSA HC

Petitioner,

ORDER DISMISSING SUCCESSIVE  
PETITION FOR WRIT OF HABEAS  
CORPUS PURSUANT TO  
28 U.S.C. § 2244(b)

v.

R. DAVIS, Warden,

ORDER DIRECTING CLERK OF COURT  
TO ENTER JUDGMENT AND CLOSE CASE

Respondent.

ORDER DECLINING ISSUANCE OF  
CERTIFICATE OF APPEALABILITY

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. She has consented to the jurisdiction of the magistrate judge pursuant to 28 U.S.C. § 636(c).

In the petition filed on September 4, 2012, Petitioner challenges her 2006 conviction in Fresno County Superior Court for theft, embezzlement and fraud. A review of the Court's dockets and files shows Petitioner has already sought habeas relief with respect to these convictions in Ghafur v. Eichenberger, case no. 1:08-cv-01502 OWW JMD HC. In that case, the petition was denied and judgment was entered on March 31, 2011.

**DISCUSSION**

A federal court must dismiss a second or successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive petition raising a new ground unless the petitioner can show that 1) the claim rests on a new, retroactive,

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  
3 constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying  
4 offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court that decides whether a  
5 second or successive petition meets these requirements, which allow a petitioner to file a second or  
6 successive petition.

7 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this  
8 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an  
9 order authorizing the district court to consider the application." In other words, Petitioner must  
10 obtain leave from the Ninth Circuit before she can file a second or successive petition in district  
11 court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or  
12 successive petition unless the Court of Appeals has given Petitioner leave to file the petition because  
13 a district court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United  
14 States, 129 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997),  
15 *cert. denied*, 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

16 Because the current petition was filed after April 24, 1996, the provisions of the  
17 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current  
18 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that she has  
19 obtained prior leave from the Ninth Circuit to file her successive petition attacking the conviction.  
20 That being so, this Court has no jurisdiction to consider Petitioner's renewed application for relief  
21 from that conviction under Section 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at  
22 1277; Nunez, 96 F.3d at 991. If Petitioner desires to proceed in bringing this petition for writ of  
23 habeas corpus, she must file for leave to do so with the Ninth Circuit. See 28 U.S.C. § 2244 (b)(3).

#### 24 **CERTIFICATE OF APPEALABILITY**

25 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a  
26 district court's denial of his petition, and an appeal is only allowed in certain circumstances. Miller-  
27 El v. Cockrell, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue  
28 a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

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

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

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

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

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

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

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

13 If a court denies a petitioner's petition, the court may only issue a certificate of appealability  
14 "if jurists of reason could disagree with the district court's resolution of h[er] constitutional claims or  
15 that jurists could conclude the issues presented are adequate to deserve encouragement to proceed  
16 further." Miller-El, 537 U.S. at 327; Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the  
17 petitioner is not required to prove the merits of his case, she must demonstrate "something more than  
18 the absence of frivolity or the existence of mere good faith on h[er] . . . part." Miller-El, 537 U.S. at  
19 338.

20 In the present case, the Court finds that reasonable jurists would not find the Court's  
21 determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or  
22 deserving of encouragement to proceed further. Petitioner has not made the required substantial  
23 showing of the denial of a constitutional right. Accordingly, the Court hereby **DECLINES** to issue a  
24 certificate of appealability.

25 **ORDER**

26 Accordingly, IT IS HEREBY ORDERED:

- 27 1) The petition for writ of habeas corpus is **DISMISSED** as successive;  
28 2) The Clerk of Court is **DIRECTED** to enter judgment and close the case; and

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3) The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

**Dated: October 1, 2012**

**/s/ Gary S. Austin**  
**UNITED STATES MAGISTRATE JUDGE**