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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

BENANCIO RODRIGUEZ,  
Petitioner,  
v.  
K. ALLISON, Warden,  
Respondent.

Case No. 1:14-cv-01864-GSA-HC  
ORDER DISMISSING PETITION FOR  
WRIT OF HABEAS CORPUS  
ORDER DIRECTING CLERK OF COURT  
TO ENTER JUDGMENT AND CLOSE  
CASE  
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. He has consented to the jurisdiction of the Magistrate Judge pursuant to 28 U.S.C. § 636(c).

On November 16, 2014, Petitioner filed the instant federal challenges his 1998 conviction sustained in Kern County Superior Court for failing to register as a convicted sex offender pursuant to Cal. Penal Code § 290(g)(2). A review of the Court's dockets and files shows Petitioner has previously sought habeas relief with respect to this conviction in Rodriguez v Allison, Case No. 1:11-CV-01714-GSA-HC. In that case, the petition was dismissed as time-barred. Petitioner appealed the dismissal to the Ninth Circuit Court of Appeals, and the certificate of appealability was denied on January 18, 2013. The Court notes that the instant petition raises virtually the same claims as the prior petition.

1 I.

2 DISCUSSION

3 A federal court must dismiss a second or successive petition that raises the same grounds  
4 as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive  
5 petition raising a new ground unless the petitioner can show that 1) the claim rests on a new,  
6 retroactive, constitutional right or 2) the factual basis of the claim was not previously  
7 discoverable through due diligence, and these new facts establish by clear and convincing  
8 evidence that but for the constitutional error, no reasonable factfinder would have found the  
9 applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the  
10 district court that decides whether a second or successive petition meets these requirements.

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

21 Because the current petition was filed after April 24, 1996, the provisions of the  
22 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current  
23 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that he has  
24 obtained prior leave from the Ninth Circuit to file his successive petition attacking the  
25 conviction. That being so, this Court has no jurisdiction to consider Petitioner's renewed  
26 application for relief from that conviction under Section 2254 and must dismiss the petition. See  
27 Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991.

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1 **II.**

2 **CERTIFICATE OF APPEALABILITY**

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

7 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a  
8 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.

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

12 (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—

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

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

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

18 (3) The certificate of appealability under paragraph (1) shall indicate  
19 which specific issue or issues satisfy the showing required by paragraph  
20 (2).

21 If a court denies a petitioner's petition, the court may only issue a certificate of  
22 appealability "if jurists of reason could disagree with the district court's resolution of his  
23 constitutional claims or that jurists could conclude the issues presented are adequate to deserve  
24 encouragement to proceed further." Miller-El, 537 U.S. at 327; Slack v. McDaniel, 529 U.S. 473,  
25 484 (2000). While the petitioner is not required to prove the merits of his case, he must  
26 demonstrate "something more than the absence of frivolity or the existence of mere good faith on  
27 his . . . part." Miller-El, 537 U.S. at 338.

28 In the present case, the Court finds that reasonable jurists would not find the Court's

1 determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or  
2 deserving of encouragement to proceed further. Petitioner has not made the required substantial  
3 showing of the denial of a constitutional right. Accordingly, the Court hereby declines to issue a  
4 certificate of appealability.

5 **III.**

6 **ORDER**

7 Based on the foregoing, IT IS HEREBY ORDERED:

- 8 1) The petition for writ of habeas corpus is DISMISSED as successive;  
9 2) The Clerk of Court is DIRECTED to enter judgment and terminate the case; and  
10 3) The Court DECLINES to issue a certificate of appealability.

11 IT IS SO ORDERED.

12 Dated: January 7, 2015

13 /s/ Gary S. Austin  
14 UNITED STATES MAGISTRATE JUDGE