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8 **UNITED STATES DISTRICT COURT**

9 EASTERN DISTRICT OF CALIFORNIA  
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11 KARI MARIE COLE,

12 Petitioner,

13 v.

14 DARRELL ADAMS, Warden,

15 Respondent.  
16  
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Case No. 1:17-cv-00558-JLT (HC)

ORDER DISMISSING SUCCESSIVE  
PETITION FOR WRIT OF HABEAS  
CORPUS

ORDER DIRECTING CLERK OF COURT  
TO ENTER JUDGMENT AND CLOSE  
CASE

ORDER DECLINING ISSUANCE OF  
CERTIFICATE OF APPEALABILITY  
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19 On June 18, 2000, Petitioner was convicted in the Fresno County Superior Court of  
20 second degree murder with gun enhancements. Petitioner was sentenced to an indeterminate  
21 term of forty-years-to-life. Petitioner sought review in the state courts.

22 This petition challenges the 2000 conviction and presents a claim of ineffective assistance  
23 of counsel. However, the instant petition is successive. Petitioner has filed two prior habeas  
24 petitions concerning the 2000 conviction: Case No. 1:06-cv-00222-LJO-TAG-HC, Cole v.  
25 Gonzales (dismissed for failure to prosecute); and Case No. 1:11-cv-00800-GSA-HC, Cole v. On  
26 Habeas Corpus (dismissed as successive).

27 **DISCUSSION**

28 A dismissal for failure to prosecute is treated as a judgment on the merits. Plaut v.

1 Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995); Reyes v. United States, 1999 WL 1021815 \*3  
2 (E.D.N.Y.1999) (dismissal of first habeas petition for failure to prosecute pursuant to  
3 Fed.R.Civ.P. 41(b) constitutes dismissal on the merits and renders subsequently filed habeas  
4 petition second or successive). If a previous petition is deemed to have been decided on the  
5 merits, then a subsequent petition raising the same claims or challenging the same conviction is  
6 treated as a successive petition pursuant to 28 U.S.C. § 2244(b). A federal court must dismiss a  
7 second or successive petition that raises the same grounds as a prior petition. 28 U.S.C. §  
8 2244(b)(1). The court must also dismiss a second or successive petition raising a new ground  
9 unless the petitioner can show that 1) the claim rests on a new, retroactive, constitutional right or  
10 2) the factual basis of the claim was not previously discoverable through due diligence, and these  
11 new facts establish by clear and convincing evidence that but for the constitutional error, no  
12 reasonable factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C.  
13 § 2244(b)(2)(A)-(B). However, it is not the district court that decides whether a second or  
14 successive petition meets these requirements, which allow a petitioner to file a second or  
15 successive petition.

16 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by  
17 this section is filed in the district court, the applicant shall move in the appropriate court of  
18 appeals for an order authorizing the district court to consider the application." In other words,  
19 Petitioner must obtain leave from the Ninth Circuit before she can file a second or successive  
20 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must  
21 dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave  
22 to file the petition because a district court lacks subject-matter jurisdiction over a second or  
23 successive petition. Burton v. Stewart, 549 U.S. 147, 152 (2007); Cooper v. Calderon, 274 F.3d  
24 1270, 1274 (9<sup>th</sup> Cir. 2001).

25 Because the current petition was filed after April 24, 1996, the provisions of the  
26 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current  
27 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997). Petitioner makes no showing that she has  
28 obtained prior leave from the Ninth Circuit to file her successive petition attacking the

conviction. That being so, this Court has no jurisdiction to consider Petitioner's renewed application for relief from that conviction under Section 2254 and must dismiss the petition. See Greenawalt, 105 F.3d at 1277; Nunez, 96 F.3d at 991.

#### **CERTIFICATE OF APPEALABILITY**

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

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

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the 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—

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

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

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

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

If a court denies a petitioner's petition, the court may only issue a certificate of appealability "if jurists of reason could disagree with the district court's resolution of her 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). While the petitioner is not required to prove the merits of her case, she must demonstrate "something more than the absence of frivolity or the existence of mere good faith on h[er] . . . part." Miller-El, 537 U.S. at 338.

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

6 **ORDER**

7 Accordingly, the Court **ORDERS**:

- 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 close the case; and  
10 3) The Court DECLINES to issue a certificate of appealability.

11 IT IS SO ORDERED.  
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13 Dated: May 12, 2017

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE