



1 On May 14, 2008, Petitioner filed a federal petition for writ of habeas corpus pursuant to  
2 28 U.S.C. § 2254. *See Faulkner v. Mule Creek State Prison* (E.D. Cal.) (No. 1:08-cv-00806-JMD  
3 HC), Doc. 1. The Court denied the petition with prejudice on October 21, 2009. *Id.*, Doc. 31.

4 On July 14, 2011, Petitioner filed a second § 2254 petition. *See Faulkner v. Knipp* (E.D.  
5 Cal.) (No. 1:11-cv-01163-LJO-MJS HC) Doc. 1. On November 22, 2011, the Court dismissed  
6 the petition as second or successive and declined to issue a certificate of appealability. *Id.*, Doc.  
7 13. Petitioner sought to file a notice of appeal in the U.S. Court of Appeal for the Ninth Circuit,  
8 which also denied a certificate of appeal.

9 Petitioner filed the above-captioned petition on May 19, 2017. On June 1, 2017,  
10 Petitioner filed another, substantially similar, petition. *Faulkner v. Davies* (E.D. Cal.) (No. 1:17-  
11 cv-00752-JLT HC).

## 12 **II. No District Court Jurisdiction Over a Second or Successive Petition**

13 The circuit court of appeals, not the district court, must decide whether a second or  
14 successive petition satisfies the statutory requirements to proceed. 28 U.S.C. § 2244(b)(3)(A)  
15 ("Before a second or successive petition permitted by this section is filed in the district court, the  
16 applicant shall move in the appropriate court of appeals for an order authorizing the district court  
17 to consider the application"). This means that a petitioner may not file a second or successive  
18 petition in district court until he has obtained leave from the court of appeals. *Felker v. Turpin*,  
19 518 U.S. 651, 656-57 (1996). In the absence of an order from the appropriate circuit court, a  
20 district court lacks jurisdiction over the petition and must dismiss the second or successive  
21 petition. *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9<sup>th</sup> Cir. 1997).

22 Petitioner has not secured leave from the Ninth Circuit Court of Appeals to file the above-  
23 captioned petition. Accordingly, the Court must dismiss it for lack of jurisdiction.

## 24 **III. Certificate of Appealability**

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

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

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

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

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

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

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

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

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

27 Reasonable jurists would not find the Court's determination that the petition is a second or  
28 successive petition to be debatable or wrong, or conclude that the issues presented require further  
adjudication. Accordingly, the Court should decline to issue a certificate of appealability.

///

1 **IV. Conclusion and Recommendation**

2 The undersigned recommends that the Court dismiss the Petition for writ of habeas corpus  
3 as second or successive and decline to issue a certificate of appealability. Despite the denial of a  
4 certificate of appealability, the dismissal is without prejudice to Petitioner's seeking leave to file a  
5 second or successive petition pursuant to 28 U.S.C. § 2244(b)(3)(A).  
6

7 These Findings and Recommendations will be submitted to the United States District  
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty**  
9 **(30) days** after being served with these Findings and Recommendations, Petitioner may file  
10 written objections with the Court. The document should be captioned "Objections to Magistrate  
11 Judge's Findings and Recommendations." Replies to the objections, if any, shall be served and  
12 filed within **fourteen (14) days** after service of the objections. The parties are advised that failure  
13 to file objections within the specified time may constitute waiver of the right to appeal the District  
14 Court's order. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 ((9th Cir. 2014) (citing *Baxter v.*  
15 *Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).  
16  
17

18 IT IS SO ORDERED.

19 Dated: June 12, 2017

20 /s/ Sheila K. Olerto  
21 UNITED STATES MAGISTRATE JUDGE  
22  
23  
24  
25  
26  
27  
28