



1 California state courts.

2 On October 30, 2006, Petitioner filed a federal habeas petition. *Toscano v. Hedgpeth*,  
3 2007 WL 1725663 OWW-SMS (E.D. Cal June 14, 2007). The Court dismissed the petition as  
4 untimely. Petitioner filed the above-captioned petition on September 21, 2017.

5 **II. Preliminary Screening**

6 Rule 4 of the Rules Governing § 2254 cases requires the Court to conduct a preliminary  
7 review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it  
8 plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the  
9 Rules Governing 2254 Cases; *see also Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).  
10 A petition for habeas corpus should not be dismissed without leave to amend unless it appears  
11 that no tenable claim for relief can be pleaded were such leave to be granted. *Jarvis v. Nelson*,  
12 440 F.2d 13, 14 (9th Cir. 1971).

13 **III. No District Court Jurisdiction Over a Second or Successive Petition**

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

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

25 **III. Certificate of Appealability**

26 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a  
27 district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v.*  
28

1 *Cockrell*, 537 U.S. 322, 335-36 (2003). Title 28 U.S.C. § 2253, the controlling statute in  
2 determining whether to issue a certificate of appealability, provides:  
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4 (a) In a habeas corpus proceeding or a proceeding under section 2255  
5 before a district judge, the final order shall be subject to review, on appeal, by  
6 the court of appeals for the circuit in which the proceeding is held.

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

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

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

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

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

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

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

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

**IV. Conclusion and Order**

The petition for writ of habeas corpus is hereby DISMISSED as a second or successive petition. The Court declines to issue a certificate of appealability. The dismissal, however, is without prejudice for Petitioner to seek leave to file a second or successive petition pursuant to 28 U.S.C. § 2244(b)(3)(A).

IT IS SO ORDERED.

Dated: October 30, 2017

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE