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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ALTON KING,  
  
                                Petitioner,  
  
                                v.  
  
WARDEN RAYTHEL FISHER,  
  
                                Respondent.

No. 1:18-cv-00659-SKO HC

**FINDINGS AND RECOMMENDATIONS  
FOR DISMISSAL OF PETITIONER AS  
SECOND OR SUCCESSIVE  
  
COURT CLERK TO ASSIGN DISTRICT  
JUDGE**

**(Doc. 1)**

**Screening Order**

Petitioner, Alton King, is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition alleges one claim for habeas relief: the state court erred in calculating his credits. Because Petitioner has filed two previous habeas petitions concerning the same conviction, the Court will recommend dismissing the petition as second or successive.

**I. Procedural and Factual Background**

Petitioner was convicted in Santa Clara County Superior Court of continuous sexual abuse of a child under fourteen years of age (Cal. Penal Code § 288.5(a)) and committing a lewd and

1 lascivious act on a child under fourteen (Cal. Penal Code § 288(a)). *People v. King*, No.  
2 H032896, 2009 WL 4818067 (Cal. Ct. App. Dec. 15, 2009). Petitioner was sentenced to a prison  
3 term of 18 years. *Id.*

4 On June 7, 2011, Petitioner filed a petition for federal habeas relief pursuant to 28 U.S.C §  
5 2254, which the Court denied. *King v. Adams*, No. C 11-02792-SI, 2014 WL 4646581 (N.D. Cal.  
6 Aug. 26, 2014). Petitioner filed the above-captioned petition on April 2, 2018 in the United  
7 States District Court for the Northern District of California. The case was transferred to this  
8 Court on May 15, 2018.

9 **II. Preliminary Screening**

10 Rule 4 of the Rules Governing § 2254 cases requires the Court to conduct a preliminary  
11 review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it  
12 plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the  
13 Rules Governing 2254 Cases; *see also Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).  
14 A petition for habeas corpus should not be dismissed without leave to amend unless it appears  
15 that no tenable claim for relief can be pleaded were such leave to be granted. *Jarvis v. Nelson*,  
16 440 F.2d 13, 14 (9th Cir. 1971).

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

18 The circuit court of appeals, not the district court, must decide whether a second or  
19 successive petition satisfies the statutory requirements to proceed. 28 U.S.C. § 2244(b)(3)(A)  
20 ("Before a second or successive petition permitted by this section is filed in the district court, the  
21 applicant shall move in the appropriate court of appeals for an order authorizing the district court  
22 to consider the application"). This means that a petitioner may not file a second or successive  
23 petition in district court until he has obtained leave from the court of appeals. *Felker v. Turpin*,  
24 518 U.S. 651, 656-57 (1996). In the absence of an order from the appropriate circuit court, a  
25 district court lacks jurisdiction over the petition and must dismiss the second or successive  
26 petition. *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir. 1997).

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

1 **III. Certificate of Appealability**

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

6 (a) In a habeas corpus proceeding or a proceeding under section 2255  
7 before a district judge, the final order shall be subject to review, on appeal, by  
8 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  
10 to test the validity of a warrant to remove to another district or place for  
11 commitment or trial a person charged with a criminal offense against the  
12 United States, or to test the validity of such person's detention pending  
13 removal proceedings.

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

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

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

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

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

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

