



1     **I.     Second or Successive Petition**

2             A federal court will not consider a second or successive habeas corpus petition that raises  
3 a claim unless the petitioner shows that (1) the claim relies on a new rule of constitutional law,  
4 made retroactive by the Supreme Court, that was previously unavailable or (2) the factual  
5 predicate for the claim could not have been discovered previously through the exercise of due  
6 diligence. *See* 28 U.S.C. § 2244(b)(2). A district court may not decide whether a petition meets  
7 these requirements; the petitioner must obtain the authorization from the appropriate court of  
8 appeals before filing the petition. *See* 28 U.S.C. § 2244(b)(3)(A); *Burton v. Stewart*, 549 U.S.  
9 147, 157 (2007). The authorization from the appropriate court of appeals is a jurisdictional  
10 requirement. *See Burton*, 549 U.S. at 157.

11             The definition of the phrase “second or successive” does not appear under the  
12 Antiterrorism and Effective Death Penalty Act of 1996, so courts look to case law to determine its  
13 meaning. *See Brown v. Muniz*, 889 F.3d 661, 667 (9th Cir. 2018). The phrase does not refer to  
14 all federal habeas petitions filed after the first petition. *See Magwood v. Patterson*, 561 U.S. 320,  
15 332 (2010). Instead, a petition is second or successive if (1) the facts underlying the claim  
16 occurred by the time of the initial petition; and (2) the petition challenges the same state court  
17 judgment as the initial petition. *Brown v. Muniz*, 889 F.3d 661, 667 (9th Cir. 2018) (citing  
18 *Magwood*, 561 U.S. at 333 and *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007)). A petition is  
19 second or successive only if it raises claims that were or could have been adjudicated on the  
20 merits. *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009).

21             Here, the petition is successive. Petitioner filed another Section 2254 petition in 2009.  
22 *See Oden v. Haws*, No. 1:09-cv-1458, 2010 WL 2556853 (E.D. Cal. June 21, 2010). The facts  
23 underlying the petition in this case—petitioner’s sentencing in 1986—occurred before the 2009  
24 petition. The instant petition challenges the same 1986 state judgment that petitioner challenged  
25 in 2009. *Compare id.* at \*2, with ECF No. 1 at 6. The 2009 petition was dismissed as untimely,  
26 *see Oden*, 2010 WL 2556853, at \*2, and that dismissal, which foreclosed the possibility of future  
27 litigation, is a decision on the merits. *See McNabb*, 576 F.3d at 1029 (“We therefore hold that  
28 dismissal of a section 2254 habeas petition for failure to comply with the statute of limitations

1 renders subsequent petitions second or successive for purposes of the AEDPA . . . .”).

2           Petitioner has not obtained authorization from the Ninth Circuit to file a successive  
3 petition, so we lack jurisdiction over this case. We recommend that the court dismiss the case for  
4 lack of jurisdiction. We need not address two other obvious defects in the petition:

5 (1) petitioner’s claim that the state court lacked the statutory authority to sentence him for second-  
6 degree murder; and (2) the untimeliness of the petition, which challenges a sentence from 1986.

7 **II. Certificate of Appealability**

8           A petitioner seeking a writ of habeas corpus has no absolute right to appeal a district  
9 court’s denial of a petition; he may appeal only in limited circumstances. *See* 28 U.S.C. § 2253;  
10 *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). Rule 11 Governing Section 2254 Cases  
11 requires a district court to issue or deny a certificate of appealability when entering a final order  
12 adverse to a petitioner. *See also* Ninth Circuit Rule 22-1(a); *United States v. Asrar*, 116 F.3d  
13 1268, 1270 (9th Cir. 1997). A certificate of appealability will not issue unless a petitioner makes  
14 “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This  
15 standard requires the petitioner to show that “jurists of reason could disagree with the district  
16 court’s resolution of his constitutional claims or that jurists could conclude the issues presented  
17 are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327; *see Slack*  
18 *v. McDaniel*, 529 U.S. 473, 484 (2000). The petitioner must show “something more than the  
19 absence of frivolity or the existence of mere good faith.” *Miller-El*, 537 U.S. at 338.

20           Reasonable jurists would not disagree that the petition here is an unauthorized successive  
21 petition and that it should not proceed further. Thus, the court should decline to issue a certificate  
22 of appealability.

23 **III. Findings and recommendations**

24           We recommend that the petition be dismissed as an unauthorized successive petition and  
25 that the court decline to issue a certificate of appealability. We submit the findings and  
26 recommendations to the U.S. District Court Judge who will be assigned to the case under 28  
27 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District  
28 Court, Eastern District of California. Within 14 days of the service of the findings and

1 recommendations, petitioner may file written objections to the findings and recommendations  
2 with the court and serve a copy on all parties. That document must be captioned “Objections to  
3 Magistrate Judge’s Findings and Recommendations.” The assigned District Judge will then  
4 review the findings and recommendations under 28 U.S.C. § 636(b)(1)(C). Petitioner’s failure to  
5 file objections within the specified time may result in the waiver of rights on appeal. *See*  
6 *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014).

7 **IV. Order**

8 The clerk of court is directed to assign this case to a district judge who will review the  
9 findings and recommendations.

10 IT IS SO ORDERED.

11  
12 Dated: May 14, 2019

13   
14 UNITED STATES MAGISTRATE JUDGE

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