





1 In the present petition, petitioner seeks to challenge his custody under the same judgment of  
2 conviction that he previously challenged in No. 3:06-cv-00492. The present petition constitutes a  
3 second or successive petition because that prior petition was dismissed as untimely. *See McNabb v.*  
4 *Yates*, 576 F.3d 1028, 1030 (9th Cir. 2009)(holding that the dismissal of a federal petition on the  
5 ground of untimeliness is a determination on the merits for purposes of § 2244(b)).

6 The Court of Appeals denied petitioner authorization to file a second or successive petition on  
7 substantially the same grounds presented in the current petition virtually immediately prior to  
8 petitioner's filing of the current petition. That denial is law of the case and binding on this lower court.

9 Petitioner's argument in the petition as to why – despite the Ninth Circuit's clear denial of  
10 authorization, to which he does not refer – he is not required to obtain authorization further is meritless.

11 Petitioner urges that he is not required to obtain authorization to file a second or successive  
12 petition because the prior dismissal was not on the merits. Ninth Circuit law clearly establishes,  
13 however, that a dismissal on the basis of untimeliness constitutes a determination on the merits for  
14 application of successive petition rules. *McNabb, supra*.

15 Petitioner further maintains that he cannot be charged with abuse of writ because he allegedly  
16 was unaware of the factual basis of his breach of contract claim with regard to the plea agreement. To  
17 the extent that such an argument might have any bearing on whether petitioner may pursue a successive  
18 petition, he must present the argument to the Court of Appeals in an application for authorization to file  
19 a second or successive petition. That authorization has been denied by the Ninth Circuit.<sup>3</sup>

20 Petitioner's arguments seeking to overcome the known successive-petition issue are wholly  
21 without merit, and further proceedings in this matter would be an improvident application of limited  
22 judicial resources. The action therefore will be dismissed for lack of jurisdiction.

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25 <sup>3</sup>Petitioner further urges that he only recently began serving the consecutive sentence on the second charge on  
26 which he was convicted. That point has nothing to do with whether his petition is successive. Petitioner further refers  
27 to the Court's order in No. 2:15-cv-00062-JCM-GWF that it could not address his breach of contract claim. However,  
28 the Court held that it could not address the claim because it was not presented in the pleadings in that matter; and the  
Court further held that it could not construe the petition in that matter to include such a claim because it would render  
the petition a successive petition. See No. 2:15-cv-00062, ECF No. 26, at 5 & n.2. The Court's order in the prior case  
did not – and could not – authorize petitioner to pursue a second or successive petition. Only the Court of Appeals can  
do so, and the Court of Appeals clearly has denied such authorization.

1           **IT THEREFORE IS ORDERED** that petitioner’s application (ECF No. 1) to proceed *in forma*  
2 *pauperis* is **DENIED** as moot following upon the payment of the filing fee.

3           **IT FURTHER IS ORDERED** that the Clerk of Court shall file the petition and that the petition  
4 is **DISMISSED** without prejudice for lack of jurisdiction as a successive petition.<sup>4</sup>


5           **IT FURTHER IS ORDERED** that petitioner’s motion (ECF No. 2) to raise his copy credit  
6 limit is **DENIED** as moot following upon the dismissal of the action and further because petitioner did  
7 not present documentation establishing that his copy credit limit had been exceeded currently.

8           **IT FURTHER IS ORDERED** that a certificate of appealability is **DENIED** as reasonable  
9 jurists would not find the district court’s dismissal of the petition as successive to be debatable or  
10 wrong, for the reasons discussed herein. The present petition represents a frivolous attempt to  
11 circumvent the rules governing second or successive (SOS) petitions in general and a recent SOS denial  
12 by the Ninth Circuit in particular.

13           **IT FURTHER IS ORDERED**, pursuant to Rule 4 of the Rules Governing Section 2254 Cases,  
14 that the Clerk shall make informal electronic service upon respondents by adding Nevada Attorney  
15 General Adam P. Laxalt as counsel for respondents and directing a notice of electronic filing of this  
16 order to his office. **No response is required from respondents other than to respond to any orders**  
17 **of a reviewing court.**

18           The Clerk of Court shall enter final judgment accordingly, in favor of respondents and against  
19 petitioner, dismissing this action without prejudice.

20           Dated: October 26, 2017.

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25           ANDREW P. GORDON  
26           United States District Judge

27           <sup>4</sup>The filing of the petition does not signify that the papers presented are free of other deficiencies. *Inter alia*,  
28 petitioner must file a petition on the Court’s required § 2254 petition form. Further, petitioner’s arguments therein under  
*Mayle v. Felix*, 545 U.S. 644 (2005), seeking to overcome the clear untimeliness of the petition also are meritless.