



SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

July 30, 2018

RE: FOX SALERNO v HON. GENTRY/STATE

Arizona Supreme Court No. CR-18-0127-PR

Court of Appeals, Division One No. 1 CA-SA 18-0034

Maricopa County Superior Court No. CR2000-017362

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 30, 2018, in regard to the above-referenced cause:

ORDERED: Special Action an Accelerated Brief, and is Submitted Under Rule 29(b)(2) = DENIED.

A panel composed of Chief Justice Bales, Justice Pelander, Justice Gould and Justice Lopez participated in the determination of this matter.

Janet Johnson, Clerk

TO:

Joseph T Maziarz

Diane Meloche

Hon Jo Lynn Gentry

Fox Joseph Salerno, CDOC 164490, Colorado Department of
Corrections, Buena Vista Correctional Facility

Amy M Wood

jd

-A-

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 2/20/18
AMY M. WOOD,
CLERK
BY: RB

FOX JOSEPH SALERNO,)
) Court of Appeals
) Division One
Petitioner,) No. 1 CA-SA 18-0034
)
v.) Maricopa County
) Superior Court
THE HONORABLE JO LYNN GENTRY,) No. CR2000-017362
Judge of the SUPERIOR COURT OF)
THE STATE OF ARIZONA, in and for)
the County of MARICOPA,)
)
Respondent Judge,)
)
STATE OF ARIZONA,)
)
Real Party in Interest.)
_____)

ORDER DECLINING JURISDICTION

The court, Presiding Judge Lawrence F. Winthrop, Judge Jennifer B. Campbell, and Chief Judge Samuel A. Thumma participating, has considered Petitioner Fox Joseph Salerno's petition for special action. After consideration,

IT IS ORDERED declining jurisdiction of Petitioner's petition for special action.

IT IS FURTHER ORDERED vacating this court's previous order requiring the filing and service of a response to the petition and vacating the conference scheduled for March 6, 2018.

_____/s/_____
LAWRENCE F. WINTHROP, Presiding Judge

- Bf

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

FOX JOSEPH SALERNO, *Petitioner*.

No. 1 CA-CR 18-0063 PRPC
FILED 7-24-18

Petition for Review from the Superior Court in Maricopa County

No. CR2000-017362

The Honorable Jo Lynn Gentry, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Daniel Strange
Counsel for Respondent

Fox Joseph Salerno, Buena Vista, Colorado
Petitioner

MEMORANDUM DECISION

Presiding Judge Kenton D. Jones, Judge Michael J. Brown, and Judge Jon
W. Thompson delivered the decision of the Court.

STATE v. SALERNO
Decision of the Court

PER CURIAM:

¶1 Petitioner Fox Salerno seeks review of the superior court's order denying his petition for post-conviction relief, filed pursuant to Arizona Rule of Criminal Procedure 32.1. This is the petitioner's seventh successive petition.

¶2 Absent an abuse of discretion or error of law, this Court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 576-77, ¶ 19 (2012). It is the petitioner's burden to show that the superior court abused its discretion in denying the petition. See *State v. Poblete*, 227 Ariz. 537, 538, ¶ 1 (App. 2011).

¶3 We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, and the petition for review. We find that petitioner has not shown any abuse of discretion.

¶4 Accordingly, we grant review and deny relief.



AMY M. WOOD • Clerk of the Court
FILED: JT

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2000-017362

12/21/2017

HONORABLE JO LYNN GENTRY

CLERK OF THE COURT
A. Moore
Deputy

STATE OF ARIZONA

DANIEL STRANGE

v.

FOX JOSEPH SALERNO (A)

MARK HEATH

COURT ADMIN-CRIMINAL-PCR

UNDER ADVISEMENT RULING –
PCR DISMISSED

Defendant Salerno claims relief based upon newly discovered material evidence that probably would have changed the conviction or sentence under Arizona Rule of Criminal Procedure 32.1(e). Although such claims are not necessarily precluded under Rule 32.2(a), when raised they “must set forth the substance of the specific exception and the reasons for not raising the claim . . . in a timely manner.” Ariz. R. Crim. P. 32.2(b); *see also* Ariz. R. Crim. P. 32.1(e). “If . . . meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated . . . in a timely manner, the notice shall be summarily dismissed.” Ariz. R. Crim. P. 32.2(b).

In 2001, a jury convicted Salerno of theft, a class three felony, and the superior court sentenced him to an aggravated twenty-year prison term. Between 2003 and 2009, Salerno filed multiple petitions for post-conviction relief, all of which were unsuccessful. In addition to these proceedings in the criminal action, Salerno also sought relief through civil court proceedings. A recurring theme in several of the petitions for post-conviction relief and the civil proceedings was Salerno’s claim that the victim and the prosecutor withheld evidence that would have established his innocence of the theft charge. In his current Petition for Post-Conviction-Relief, Salerno claims newly discovered evidence. Salerno claims he, for the first time, found documents in the prosecutor’s file that if disclosed, would have changed the outcome of the case. Salerno gained access to the prosecutor’s file in 2012 through a 42 U.S.C. § 1983 action against the Maricopa County Attorney’s Office. Among the documents found in the file were undisclosed business records that Salerno alleges support his defense that he paid for the

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2000-017362

12/21/2017

merchandise that he was accused of stealing. He claims he also discovered a letter from the prosecutor to his trial attorney offering a favorable plea agreement that Salerno alleges was never presented to him by his counsel for consideration.

On November 22, 2017, the court held an evidentiary hearing on the allegations that the prosecutor withheld evidence and that a favorable plea offer was made but never communicated to him.

To be entitled to post-conviction relief based on newly discovered evidence, the defendant must show that the evidence was discovered after trial although existed before trial; the evidence could not have been discovered and produced at trial or on appeal through reasonable diligence; the evidence is neither solely cumulative nor impeaching; the evidence is material; and the evidence probably would have changed the verdict or sentence. *State v. Saenz*, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000), *see also* Ariz. R. Crim. P. 32.1(e). To put it another way, the relevant inquiry for determining whether the defendant is entitled to an evidentiary hearing is whether he has alleged facts which, if true, "would *probably* have changed the verdict or sentence." *State v. Amaral*, 239 Ariz. 217, 220, ¶ 11, 368 P.3d 925, 928 (2016) (emphasis in original).

Defendant was a manager at a Taco Bell. As an employee, he was familiar with the requisition practices and paperwork when items were purchased for the Corporation. Defendant testified that on occasion, he would use the corporate account to purchase items for his personal use but he claims he reimbursed the corporation for these items. He purportedly requested the Expense Detail Reports (EDR) and call tracking records from Taco Bell at the time of trial. He was told the requested paperwork did not exist because there had been a break-in and files were stolen, including the file that he alleges would have contained the EDRs and call tracking records. Salerno testified at trial that the witness from Taco Bell also testified that the EDRs and call tracking records had been stolen in a break-in. After trial, Salerno was convicted of the offense and sentenced to 20 years in the Department of Corrections. In 2003, Salerno filed a Petition for Post-Conviction Relief and included as exhibits to his petition the same paperwork he now claims was denied him at trial and that he found for the first time in his review of the Prosecutor's file after the 42 U.S.C. § 1983 action. Now, fifteen years later, Salerno claims he has newly discovered evidence though in reality, he has been in possession of the "newly discovered evidence" at least since 2003.

In his Petition, Salerno alleges that the newly discovered evidence was obtained by him in 2012 when he gained access to the file in 2012 through a 42 U.S.C. § 1983 action against the Maricopa County Attorney's Office. He attached copies of the "newly discovered evidence" as exhibits to his current Petition for Post-Conviction Relief. It appears he did in fact find copies of the exhibits that he claims are newly discovered evidence and which he alleges were wrongfully

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2000-017362

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withheld from him at trial. As he acknowledged at the November 22, 2017 evidentiary hearing however, the business documents he discovered in the Maricopa County Attorney's file and attached to his current PCR as exhibits were actually duplicates of the exhibits he himself had filed as exhibits to his 2003 Petition for Post-Conviction Relief. Defendant has thus been in possession of the newly discovered evidence at least since 2003. Defendant offered no evidence that the state was in possession of the business records at the time of trial or before he supplied the records as an attachment to his 2003 Petition for Post-Conviction Relief.

Salerno's second claim is that a favorable plea offer was made by the State to his then counsel but she never communicated the offer to him. Salerno claims now that had he known about the plea offer, he would have accepted it in "a heartbeat" because the plea offer stipulated to a term of probation in exchange for a guilty plea to a Class 5 Felony. Salerno claims that his trial counsel was ineffective for failing to communicate the plea offer to him. To be entitled to post-conviction relief based on this newly discovered evidence, Salerno must show the evidence probably would have changed the verdict or sentence.

The state's position was that even if the plea offer was never communicated, the lack of communication was harmless because the plea, as written, could not have been accepted because the avowals were incorrect and, if accepted, would have been rejected by the court because Salerno could not have made a factual basis to allow the Court to accept the plea. At the evidentiary hearing, Salerno acknowledged that the plea contained an avowal that incorrectly stated Defendant had two prior felonies. Defendant actually had four prior felonies. The State argued that if the Plea Offer had been made and accepted, the error would have been discovered in the presentence investigation and the State would have withdrawn the plea due to the erroneous avowal.

Defendant further maintained his claim of innocence and he was asked at the evidentiary hearing how he could therefore make a factual basis for a crime he claims he did not commit. He responded that his attorney would have stood before the court and stated "the evidence would show" and then give a factual basis to which Salerno could simply reply "yes." It was his position at the evidentiary hearing that in the plea colloquy, he could have pled guilty to a crime he did not commit because his attorney would be the one lying to the court by stating "the evidence would show" and he could admit, not that he committed the crime, but that "the evidence would show" he committed the crime.

Given the erroneous avowal at Paragraph 5 of the probation plea (Exhibit 4) and Defendant's admission that the factual basis for a plea would have been a fraud on the court, Defendant has failed to prove facts which, if true, "would *probably* have changed the verdict or sentence."

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2000-017362

12/21/2017

In sum, Defendant's submissions do not state any claims for which Rule 32 can provide relief. The defendant has the burden of alleging substantive claims, supporting those claims with specific facts, and adequately explaining why the claims are untimely. Ariz. R. Crim. P. 32.2(b). Defendant has failed to meet this standard. The Court finds that no purpose would be served by further proceedings.

IT IS THEREFORE ORDERED dismissing Defendant's Notice of Post-Conviction and "Post- Conviction Relief," which the Court deems a single Notice of Post-Conviction Relief, pursuant to Arizona Rule of Criminal Procedure 32.2(b).

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

FOX JOSEPH SALERNO, *Petitioner*.

No. 1 CA-CR 14-0728 PRPC
FILED 5-18-2017

Petition for Review from the Superior Court in Maricopa County
No. CR 2000-017362

The Honorable Jo Lynn Gentry, Judge

REVIEW GRANTED; RELIEF GRANTED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Diane M. Meloche
Counsel for Respondent

Fox Joseph Salerno, Buena Vista, Colorado
Petitioner

MEMORANDUM DECISION

Judge Lawrence F. Winthrop delivered the decision of the Court, in which
Presiding Judge Samuel A. Thumma and Judge James P. Beene joined.

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STATE v. SALERNO
Decision of the Court

WINTHROP, Judge:

¶1 Petitioner, Fox Joseph Salerno, petitions for review of the summary dismissal of his petition for post-conviction relief. We have considered the petition for review and, for the reasons stated, grant review and relief.

¶2 In 2001, a jury convicted Salerno of theft, a class three felony, and the superior court sentenced him to an aggravated twenty-year prison term. Between 2003 and 2009, Salerno filed multiple petitions for post-conviction relief, all of which were unsuccessful. In addition to these proceedings in the criminal action, Salerno also sought relief through civil court proceedings. A recurring theme in several of the petitions for post-conviction relief and the civil proceedings was Salerno's claim that the victim and the prosecutor withheld evidence that would establish his innocence of the theft charge.

¶3 In the instant proceeding for post-conviction relief, Salerno filed a petition alleging claims of newly discovered evidence based on documents found in the prosecutor's file after Salerno gained access to the file in 2012 through a 42 U.S.C. § 1983 action against the Maricopa County Attorney's Office. Among the documents found in the file were undisclosed business records that Salerno alleges support his defense that he paid for the merchandise that was the subject of the theft charge and a copy of a letter from the prosecutor to his trial counsel offering a favorable plea agreement that Salerno alleges was never presented to him by his counsel for consideration. The superior court summarily dismissed the petition, ruling Salerno failed to present any facts, records, or other evidence why these facts could not have been produced at the trial phase through reasonable diligence.

¶4 In his petition for review, Salerno argues the superior court erred in summarily dismissing his claims of newly discovered evidence without an evidentiary hearing. We review the dismissal of a petition for post-conviction relief for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, 566, ¶ 17, 146 P.3d 63, 67 (2006). An abuse of discretion is "an exercise of discretion which is manifestly unreasonable, exercised on untenable grounds or for untenable reasons." *State v. Woody*, 173 Ariz. 561, 563, 845 P.2d 487, 489 (App. 1992) (citation omitted).

¶5 "The purpose of an evidentiary hearing in the Rule 32 context is to allow the court to receive evidence, make factual determinations, and resolve material issues of fact." *State v. Gutierrez*, 229 Ariz. 573, 579, ¶ 31,

STATE v. SALERNO
Decision of the Court

from the investigating law enforcement agency, but was told all records obtained by the investigator had been delivered to the prosecutor before Salerno's criminal trial. In the same civil proceeding, however, the prosecutor in the criminal case denied receiving any undisclosed records from the investigator. It was only when Salerno was finally given access to the prosecutor's file in 2012 through his § 1983 action that the undisclosed business records and other documents giving rise to the claims of newly discovered evidence were obtained by him. Together, these facts present a colorable showing of reasonable diligence by Salerno in securing the undisclosed business records to entitle him to an evidentiary hearing on his claims of newly discovered evidence of innocence and a *Brady* violation. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¶8 The same is equally true of the discovery of the letter from the prosecutor to Salerno's trial counsel offering a formal plea agreement with a stipulation to probation. Included in the appendix to the petition for post-conviction relief is an affidavit by Salerno stating that his trial counsel never informed him of the proposed plea agreement and that if he had been informed of the offer he would have accepted it. Because Salerno never had access to the prosecutor's file in which the letter was found before 2012, no basis exists for concluding he was not diligent in bringing the claim of his trial counsel's ineffective assistance regarding the plea offer to the court's attention before the instant proceedings. See *Missouri v. Frye*, 566 U.S. 133, 147 (2012) (holding that counsel's representation may be found constitutionally deficient for failure to timely communicate a formal plea offer to a client); *State v. Donald*, 198 Ariz. 406, 411, ¶ 9, 10 P.3d 1193, 1198 (App. 2000) (recognizing defense counsel's duty to communicate the terms and relative merits of a plea offer).

¶9 For the foregoing reasons, we grant review and relief, and remand this matter to the superior court for further proceedings consistent with this decision.



AMY M. WOOD • Clerk of the Court
FILED: AA

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2000-017362

06/17/2014

HONORABLE JO LYNN GENTRY

CLERK OF THE COURT
A. Beery
Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

FOX JOSEPH SALERNO (A)

FOX JOSEPH SALERNO
#164490
P O BOX 6000
STERLING CO 80751

COURT ADMIN-CRIMINAL-PCR

POST-CONVICTION RELIEF DENIED

The Court has reviewed Defendant's Notice of Post-Conviction Relief and Petition for Post-Conviction Relief, both filed May 7, 2014. This is the defendant's seventh Rule 32 proceeding; it is both untimely and successive.

The defendant claims, pursuant to Ariz. R. Crim. P. 32.1(e), that there are newly discovered material facts which probably would have changed the verdict or sentence in his case. To be entitled to post-conviction relief based on newly discovered evidence, the defendant must show that the evidence was discovered after trial although existed before trial; the evidence could not have been discovered and produced at trial or appeal through reasonable diligence; the evidence is neither solely cumulative nor impeaching; the evidence is material; and the evidence probably would have changed the verdict or sentence. *State v. Saenz*, 197 Ariz. 487, 489, ¶ 7, 4 P.3d 1030, 1032 (App. 2000), *see also* Ariz. R. Crim. P. 32.1(e).

Defendant fails to support this claim. The defendant states the employer's internal reports from the law enforcement agency and invoices have been discovered. The defendant fails to provide any facts, affidavits, records, or other evidence to support why these facts could not have been produced at the trial phase through reasonable diligence.

Docket Code 167

Form R000A

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR 2000-017362

07/25/2014

HONORABLE JO LYNN GENTRY

CLERK OF THE COURT

A. Beery

Deputy

STATE OF ARIZONA

DIANE M MELOCHE

v.

FOX JOSEPH SALERNO (A)

FOX JOSEPH SALERNO

#164490

P O BOX 6000

STERLING CO 80751

COURT ADMIN-CRIMINAL-PCR

MINUTE ENTRY

IT IS ORDERED amending minute entry dated June 17, 2014, nunc pro tunc, by adding the Court's signature. The minute entry is as follows:

POST-CONVICTION RELIEF DENIED

The Court has reviewed Defendant's Notice of Post-Conviction Relief and Petition for Post-Conviction Relief, both filed May 7, 2014. This is the defendant's seventh Rule 32 proceeding; it is both untimely and successive.

The defendant claims, pursuant to Ariz. R. Crim. P. 32.1(e), that there are newly discovered material facts which probably would have changed the verdict or sentence in his case. To be entitled to post-conviction relief based on newly discovered evidence, the defendant must show that the evidence was discovered after trial although existed before trial; the evidence could not have been discovered and produced at trial or appeal through reasonable diligence; the

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A Salerno v. Ryan, 2018 U.S. App. LEXIS 1235

United States Court of Appeals for the Ninth Circuit

January 18, 2018, Filed

No. 17-72695

Reporter

2018 U.S. App. LEXIS 1235 *

FOX JOSEPH SALERNO, Applicant, v. CHARLES L. RYAN, Warden, Respondent.

Prior History: Salerno v. Ryan, 2017 U.S. Dist. LEXIS 161018 (D. Ariz., Sept. 27, 2017)

Disposition:

DENIED.

Core Terms

district court

Counsel: [*1] Fox Joseph Salerno, Petitioner, Pro se, Buena Vista, CO.

Judges: Before: REINHARDT, TROTT, and HURWITZ, Circuit Judges.

Opinion

ORDER

We treat the applicant's filing at Docket Entry No. 2, transferred by the district court on September 27, 2017, as an application for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court. So treated, the application is denied. The applicant has not made a prima facie showing under 28 U.S.C. § 2244(b)(2) that:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the

evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

See also *United States v. Buenrostro*, 638 F.3d 720, 725-26 (9th Cir. 2011) (in context of a 28 U.S.C. § 2255 proceeding, holding second-in-time ineffective assistance claim, ripe at time of a prisoner's first section 2255 proceeding but not discovered until afterward, to be second [*2] or successive).

Any pending motions are denied as moot.

No further filings will be entertained in this case.

DENIED.

A Salerno v. Ryan, 2017 U.S. Dist. LEXIS 161018

United States District Court for the District of Arizona

September 27, 2017, Decided; September 28, 2017, Filed

No. CV 17-02781-PHX-ROS (DMF)

Reporter

2017 U.S. Dist. LEXIS 161018 *

Fox Joseph Salerno, Petitioner, v. Charles L. Ryan, et al., Respondents.

Subsequent History: Post-conviction proceeding at, Request denied by, Motion denied by, As moot Salerno v. Ryan, 2018 U.S. App. LEXIS 1235 (9th Cir., Jan. 18, 2018)

Prior History: Salerno v. Schriro, 2005 U.S. Dist. LEXIS 39582 (D. Ariz., July 18, 2005)

Core Terms

habeas corpus, entering judgment, writ petition, Certificate

Counsel: [*1] Fox Joseph Salerno, Petitioner, Pro se, BUENA VISTA, CO.

Judges: Honorable Roslyn O. Silver, Senior United States District Judge.

Opinion by: Roslyn O. Silver

Opinion

ORDER

Petitioner Fox Joseph Salerno, who is confined in the Buena Vista Correctional Facility in Buena Vista, Colorado, has filed a pro se "Application for Certificate of Appealability or Motion to Allow Filing of Second Habeas" (Doc. 1) and has lodged a Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State Custody. Although Petitioner has filed his pleading in this Court, the document states "United States Court of Appeals for the Ninth Circuit."

Petitioner seeks permission to file a second petition for a writ of habeas corpus challenging his conviction in Maricopa County Superior Court, case #CR 2001-006753, for fraudulent schemes and artifices, trafficking in stolen property, and burglary. On April 1, 2005, Petitioner filed his first petition for a writ of habeas corpus regarding that conviction, *Salerno v. Schriro*, 05-00976-PHX-ROS. In a

- ~~Page~~ - 61 -

July 24, 2007 Order (Doc. 60 in 05-00976-PHX-ROS), the Court denied the petition, and the Clerk of Court entered Judgment accordingly (Doc. 61 in 05-00976-PHX-ROS).

....

Pursuant to Ninth Circuit Rule 22-3(a), the Court will direct **[*2]** the Clerk of Court to refer Petitioner's Motion and lodged Petition to the Ninth Circuit Court of Appeals.

IT IS ORDERED:

(1) The Clerk of Court must send a copy of this Order, Petitioner's Motion (Doc. 1), and the lodged § 2254 Petition to the **Ninth Circuit Court of Appeals**.

(2) This case is dismissed without prejudice. The Clerk of Court must close the case and enter judgment.

(3) Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court declines to issue a certificate of appealability because reasonable jurists would not find the Court's procedural ruling debatable. See Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

Dated this 27th day of September, 2017.

/s/ Roslyn O. Silver

Honorable Roslyn O. Silver

Senior United States District Judge