

1 Prior Petition was directed to the same conviction and/or sentence sustained in
2 Los Angeles County Superior Court Case No. BA242150. On July 16, 2008,
3 Judgment was entered in Case No. CV 06-99 PA (FFM) denying the Prior Petition
4 on the merits and dismissing the action with prejudice.

5 The Petition now pending is governed by the provisions of the Antiterrorism
6 and Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110 Stat. 1214) (“the
7 Act”) which became effective April 24, 1996. Section 106 of the Act amended 28
8 U.S.C. § 2244(b) to read, in pertinent part, as follows:

9 “(1) A claim presented in a second or successive habeas corpus
10 application under section 2254 that was presented in a prior application
11 shall be dismissed.

12 (2) A claim presented in a second or successive habeas corpus
13 application under section 2254 that was not presented in a prior
14 application shall be dismissed unless --

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

18 (B)(i) the factual predicate for the claim could not have been
19 discovered previously through the exercise of due diligence; and

20 (ii) the facts underlying the claim, if proven and viewed in light of
21 the evidence as a whole, would be sufficient to establish by clear and
22 convincing evidence that, but for constitutional error, no reasonable
23 factfinder would have found the applicant guilty of the underlying
24 offense.

25 (3)(A) Before a second or successive application permitted by this
26 section is filed in the district court, the applicant shall move in the
27 appropriate court of appeals for an order authorizing the district court
28 to consider the application.”

1 Therefore, because the Petition now pending challenges the same conviction
2 as Petitioner’s Prior Petition, it constitutes a second and/or successive petition
3 within the meaning of 28 U.S.C. § 2244(b). To the extent Petitioner seeks to
4 pursue the same claims he previously asserted, the Petition is barred by the
5 provisions of 28 U.S.C. § 2244(b)(1). To the extent Petitioner seeks to pursue
6 claims not previously asserted, as appears to be the case, it was incumbent on him
7 under § 2244(b)(3)(A) to secure an order from the Ninth Circuit authorizing the
8 District Court to consider the Petition, prior to his filing of it in this Court.
9 Petitioner’s failure to secure such an order from the Ninth Circuit deprives the
10 Court of subject matter jurisdiction.

11 **“REFERRAL” OF HABEAS CORPUS PETITION TO NINTH CIRCUIT**

12 Ninth Circuit Rule 22-3(a) states, in pertinent part, that “[i]f a second or
13 successive petition or motion, or an application for authorization to file such a
14 petition or motion, is mistakenly submitted to the district court, the district court
15 shall refer it to the court of appeals.”

16 Therefore, to the extent the Petition was “mistakenly submitted” to this
17 Court, the Petition must be referred to the court of appeals. However, on its face
18 the Petition states that it is directed to this Court and nothing in the Petition sets
19 forth any basis for concluding that it was filed with the intention of obtaining any
20 order permitting the filing of a second or successive petition. Thus, the Court
21 cannot conclude that the Petition was mistakenly submitted to this Court.
22 Moreover, any such transfer to the court of appeals would appear to be a useless
23 act in that the one year limitations period provided in the Act expired in 2006.
24 Therefore, the Court declines to transfer the Petition to the Ninth Circuit Court of
25 Appeals.

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1 **DENIAL OF CERTIFICATE OF APPEALABILITY**

2 Rule 11(a) of the Rules Governing § 2254 Actions provides:

3 (a) Certificate of Appealability. The district court must issue or deny
4 a certificate of appealability when it enters a final order adverse to the
5 applicant. Before entering the final order, the court may direct the
6 parties to submit arguments on whether a certificate should issue. If
7 the court issues a certificate, the court must state the specific issue or
8 issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If
9 the court denies a certificate, the parties may not appeal the denial but
10 may seek a certificate from the court of appeals under Federal Rule of
11 Appellate Procedure 22. A motion to reconsider a denial does not
12 extend the time to appeal.

13 Here, given the Court’s ruling on settled legal issues, the Court does not
14 require any arguments from the parties on whether a certificate of appealability
15 (“COA”) should issue.

16 Under 28 U.S.C. § 2253(c)(2), a COA may issue “only if the applicant has
17 made a substantial showing of the denial of a constitutional right.” Here, the
18 Court dismissed the petition on the ground that it was a second or successive
19 petition. Thus, the Court’s determination of whether a COA should issue is
20 governed by the Supreme Court’s decision in *Slack v. McDaniel*, 529 U.S. 473,
21 120 S.Ct. 1595, 146 L. Ed. 2d 542 (2000), where the Supreme Court held that,
22 “[w]hen the district court denies a habeas petition on procedural grounds without
23 reaching the prisoner’s underlying constitutional claim, a COA should issue when
24 the prisoner shows, at least, that jurists of reason would find it debatable whether
25 the petition states a valid claim of the denial of a constitutional right and that
26 jurists of reason would find it debatable whether the district court was correct in
27 its procedural ruling.” 529 U.S. at 484. As the Supreme Court further explained:

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1 Section 2253 mandates that both showings be made before the court of
2 appeals may entertain the appeal. Each component of the § 2253(c)
3 showing is part of a threshold inquiry, and a court may find that it can
4 dispose of the application in a fair and prompt manner if it proceeds
5 first to resolve the issue whose answer is more apparent from the
6 record and arguments.

7 529 U.S. at 485.

8 Here, the Court finds that its ruling is not one in which “jurists of reason
9 would find it debatable whether the district court was correct in its procedural
10 ruling” that the Court has no jurisdiction over the Petition.

11 **ORDER**

12 This action is dismissed without prejudice for lack of subject-matter
13 jurisdiction pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the
14 United States District Courts.

15 LET JUDGMENT BE ENTERED ACCORDINGLY.

16 A certificate of appealability is denied.

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18 DATED: October 8, 2014



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20 PERCY ANDERSON
21 United States District Judge

22
23 Presented by:

24 /S/ FREDERICK F. MUMM
25 FREDERICK F. MUMM
26 United States Magistrate Judge