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**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JOHN KELLER,  
Petitioner,  
v.  
DAVE DAVEY, Warden,  
Respondent.

Case No. CV 15-2838 RGK (MRW)  
**ORDER DISMISSING SUCCESSIVE  
HABEAS ACTION**

The Court vacates the reference of this action to the Magistrate Judge and summarily dismisses the action pursuant to the successive habeas petition rule in 28 U.S.C. § 2244.

\* \* \*

This is a state habeas action. Petitioner is currently serving a 15-year term in state prison following his no contest plea to an attempted robbery charge.

This is his second habeas action in federal court challenging that conviction. In Petitioner’s first action, he raised issues regarding ineffective assistance of counsel, his mental status at the time of his plea, and the sentence imposed upon him. (Keller v. Gibson, No. 14-2331 RGK (MRW) (C.D. Cal.)) In late 2014, the

1 Court dismissed the first habeas action with prejudice for raising issues that were  
2 Tollett-barred by his plea. (Keller, No. 14-2331, Docket # 33.) Petitioner filed a  
3 notice of appeal. The matter is pending in the United States Court of Appeals for  
4 the Ninth Circuit. (Keller v. Gibson, No. 14-56835 (9th Cir.))

5 Petitioner commenced the present habeas action in this Court in April 2015.  
6 The petition raises issues similar to those he previously presented to the Court.  
7 The current petition was not accompanied by a certificate from the Court of  
8 Appeals authorizing a successive habeas action.

9 Magistrate Judge Wilner screened Petitioner’s current petition. (Docket  
10 # 6.) Judge Wilner explained the successive-petition-authorization rule to  
11 Petitioner. Judge Wilner also directed Petitioner to submit a statement as to why  
12 the action should not be summarily dismissed.

13 Petitioner submitted a memorandum in response to the Court’s order.  
14 (Docket # 8.) The memorandum generally reiterated Petitioner’s contentions  
15 regarding the merits of his claim and his dissatisfaction with the Court’s dismissal  
16 of the first habeas action. However, nowhere in Petitioner’s submission was there  
17 a cogent explanation as to why the current action was not successive under federal  
18 law.

19 \* \* \*

20 If it “appears from the application that the applicant or person detained is not  
21 entitled” to habeas relief, a court may dismiss a habeas action without ordering  
22 service on the responding party. 28 U.S.C. § 2243; see also Rule 4 of Rules  
23 Governing Section 2254 Cases in United States District Courts (petition may be  
24 summarily dismissed if petitioner plainly not entitled to relief); Local Civil  
25 Rule 72-3.2 (magistrate judge may submit proposed order for summary dismissal  
26 to district judge “if it plainly appears from the face of the petition [ ] that the  
27 petitioner is not entitled to relief”).  
28

1 Under federal law, a state prisoner is generally required to present all  
2 constitutional challenges to a state conviction in a single federal action. A habeas  
3 petition is second or successive – and subject to summary dismissal under  
4 28 U.S.C. § 2244(b) – when the petition “raises claims that were or could have  
5 been adjudicated on the merits” in the first action. McNabb v. Yates, 576 F.3d  
6 1028, 1029 (9th Cir. 2009). A prisoner must obtain authorization from the Court  
7 of Appeals to pursue such a successive habeas petition before the new petition may  
8 be filed in district court. 28 U.S.C. § 2244(b)(3); Burton v. Stewart, 549 U.S. 147  
9 (2007) (dismissing successive petition for failure to obtain authorization from court  
10 of appeals).

11 \* \* \*

12 The current action is successive. Petitioner previously challenged his  
13 conviction in this Court. The current petition raises the same issues he already  
14 raised in that earlier challenge. Moreover, Petitioner’s previous case is still  
15 pending before the Ninth Circuit Court of Appeals. The record establishes that  
16 Petitioner did not have permission from the appellate court to file this action. The  
17 petition is subject to summary dismissal. The action is therefore DISMISSED  
18 without prejudice.

19 IT IS SO ORDERED.

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21 Dated: May 11, 2015



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22 HON. R. GARY KLAUSNER  
23 UNITED STATES DISTRICT JUDGE  
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