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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MICHAEL CRAIG MYERS,)	No. LA CV 16-07758-VBF-FFM
)	
)	ORDER
Petitioner,)	“Referring” the Habeas Petition to the
)	U.S. Court of Appeals as Required By
v.)	Ninth Circuit Rule 22-3(a);
)	Summarily Dismissing Action Without
)	Prejudice for Lack of Jurisdiction;
WARDEN,)	
)	Denying a Certificate of Appealability
)	and Advising Petitioner that He May Seek
)	a COA from the Ninth Circuit
Respondent.)	
)	

Proceeding pro se, California state prisoner Michael Craig Myers (“Petitioner”) constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Petition”) pursuant to 28 U.S.C. § 2254 on about December 18, 2016. *See* Case Management / Electronic Case Filing System Document (“Doc”) 1. The habeas petition challenges his January 23, 1996 conviction for being a previously convicted felon unlawfully in possession of a firearm in violation of California Penal Code section 667.5(b), apparently on the basis of ineffective assistance of trial counsel and violation of his right to due process. (*Id.* at 2.)

1 **After referring the habeas petition to the Court of Appeals pursuant to Ninth**
2 **Circuit Rule 22-3(a), this Court will then dismiss this action without prejudice.** To the
3 extent that a certificate of appealability (“COA”) is required to appeal the dismissal of this action
4 or the referral of the petition, the Court will deny a COA. “The Court will not enter a final
5 judgment at this time because today’s Order does not conclusively dispose of petitioner’s habeas
6 claims and does not necessarily foreclose his opportunity to have those claims heard on the
7 merits in federal court.” *Henderson v. Madden*, LA CV 16-02003-VBF Doc. 5 (C.D. Cal. May
8 20, 2016).

9
10 In the instant petition (Doc 1 at 7 para. 10), petitioner answered “no” to the question,
11 “Have you previously filed any habeas petitions in any federal court with respect to this
12 conviction?” That was not accurate. The Court takes judicial notice of a habeas petition¹ that
13 petitioner filed here on August 10, 2001, in case no. LA CV 01-06964-NM-RZ. The Prior
14 Petition attacked the same conviction and sentence as the present Petition. (01-06964 Doc 17 at
15 2.) On April 25, 2002, the Prior Petition was denied for lack of merit.

16 The pending Petition is governed by the provisions of the Antiterrorism and Effective
17 Death Penalty Act of 1996 (AEDPA), which became effective on April 24, 1996. Section 106
18 of the AEDPA amended 28 U.S.C. § 2244(b) to read, in pertinent part, as follows:

19
20 (1) A claim presented in a second or successive habeas corpus application under
21 section 2254 that was presented in a prior application shall be dismissed.

22 (2) A claim presented in a second or successive habeas corpus application under
23 section 2254 that was not presented in a prior application shall be dismissed
24 unless –

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

28 ¹ The Court takes judicial notice of the prior decision rendered by this Court,
available on the PACER database. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646,
649 (9th Cir. 1988) (court may take judicial notice of court records).

1 (B)(i) the factual predicate for the claim could not have been
2 discovered previously through the exercise of due diligence; and
3 (ii) the facts underlying the claim, if proven and viewed in light of
4 the evidence as a whole, would be sufficient to establish by clear and
5 convincing evidence that, but for constitutional error, no reasonable
6 factfinder would have found the applicant guilty of the underlying
7 offense.

8 (3)(A) Before a second or successive application permitted by this
9 section is filed in the district court, the applicant shall move in the
10 appropriate court of appeals for an order authorizing the district
11 court to consider the application.

12 Because the Petition now pending challenges the same conviction as the Prior Petition, it
13 is a second-or-successive petition within the meaning of 28 U.S.C. § 2244(b). To the extent
14 that petitioner seeks to pursue the same claims he previously asserted, such claims are barred by
15 28 U.S.C. § 2244(b)(1). To the extent he seeks to pursue claims *not* previously asserted, it was
16 incumbent on him under § 2244(b)(3)(A) to secure an order from the Ninth Circuit authorizing
17 the District Court to consider the petition, prior to his filing it in this Court. Petitioner's failure
18 to secure such an order from the Ninth Circuit deprives the Court of subject-matter jurisdiction.

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

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

23 Therefore, to the extent the Petition was “mistakenly submitted” to this Court, the
24 Petition must be referred to the court of appeals. However, it is unclear whether the district
25 court may both “refer” the Petition to the Ninth Circuit and, at the same time, dismiss the
26 Petition. After reviewing numerous district court cases in this circuit, this Court concludes that
27 simultaneous referral and dismissal is appropriate. **This approach is consistent with the
28 practice of at least seventeen other district judges (as well as a number of current and
former magistrate judges) in our district in recent years.** *See, e.g., Brown v. Fisher, 2016*

1 WL 2932087, *1 (C.D. Cal. May 19, 2016) (**Walter**, J.); *Scott v. Pfeiffer*, 2016 WL 1399397
2 (C.D. Cal. Mar. 4, 2016), *R&R adopted*, 2016 WL 1408050 (C.D. Cal. Apr. 6, 2016); *Farmer v.*
3 *Biter*, 2016 WL 447793, *1 (C.D. Cal. Feb. 3, 2016) (**Gee**, J.); *Dooley v. Davis*, 2016 WL
4 183054 (C.D. Cal. Jan. 12, 2016) (**Klausner**, J.); *Pace-White v. Johnson*, 2015 WL 10044278
5 (C.D. Cal. Nov. 3, 2015) (**Mumm**, M.J.), *R&R adopted*, 2016 WL 552678 (C.D. Cal. Feb. 9,
6 2016); *Block v. Duffy*, 2015 WL 5826776 (C.D. Cal. Oct. 2, 2015) (**Guilford**, J.) (“After
7 reviewing numerous district court cases in this circuit, this Court concludes that simultaneous
8 referral and dismissal is appropriate.”) (citing *Cielto v. Hedgpeth*, 2014 WL 1801110 (C.D. Cal.
9 Apr. 23, 2014) (**Fairbank**, J.)); *Brandon v. L.A. Cty. Superior Court*, 2015 WL 1541567 (C.D.
10 Cal. Apr. 2, 2015) (**Snyder**, J.); *Varnado v. Paramo*, 2014 WL 3845137 (C.D. Cal. Aug. 4,
11 2014) (**Otero**, J.); *Miller v. Biter*, 2014 WL 3810234 (C.D. Cal. July 31, 2014) (**Real**, J.); *Brock*
12 *v. Montgomery*, 2014 WL 2812315, *1 (C.D. Cal. June 23, 2014) (**O’Connell**, J.); *Perez v.*
13 *Holland*, 2014 WL 1466857 (C.D. Cal. Apr. 14, 2014) (**Carney**, J.), *appeal declared moot*, No.
14 14-55815, 2016 WL 6936605 (9th Cir. Nov. 28, 2016) (Memorandum) (Berzon, Nguyen, D.J.
15 Zouhary); *Castaneda v. Long*, 2014 WL 996490, *1 (C.D. Cal. Mar. 13, 2014) (**Anderson**, J.);
16 *Blanco v. Valenzuela*, 2014 WL 111453 (C.D. Cal. Jan. 9, 2014) (Walter, J.); *Parham v.*
17 *Diaz*, 2013 WL 5310760, *1 (C.D. Cal. Sept. 19, 2013) (**Klausner**, J.); *Vanderwall v. Soto*,
18 2015 WL 1893159 (C.D. Cal. Apr. 27, 2015) (Wright, J.) *Reed v. Roe*, 2013 WL 1970240, *1
19 (C.D. Cal. May 10, 2013) (**Wright II**, J.); *Jones v. Harris*, 2013 WL 1390036, *1 (C.D. Cal.
20 Mar. 15, 2013) (**Wilson**, J.); *Burts v. Yates*, 2012 WL 3019950, *1 (C.D. Cal. July 23, 2012)
21 (**Pregerson**, J.); *Jones v. Harrington*, 2012 WL 2573207, *1 (C.D. Cal. June 29, 2012) (**Gee**,
22 J.); *Goodall v. Marshall*, 2011 WL 6110333 (C.D. Cal. Dec. 2, 2011) (**Carter**, J.); *Olvera v.*
23 *Gonzales*, 834 F. Supp.2d 944, 945 (C.D. Cal. 2011) (**Hatter**, Senior J.); *Henderson v. Walker*,
24 2011 WL 1706775, *1 (C.D. Cal. May 5, 2011) (**Stotler**, Sr. J.); *Smith v. Beard*, 2015 WL
25 2250013 (C.D. Cal. May 12, 2015) (**Chooljian**, M.J.); *Pace-White v. Johnson*, 2015 WL
26 1833952 (C.D. Cal. Apr. 10, 2015) (**Nagle**, M.J.).
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DENIAL OF CERTIFICATE OF APPEALABILITY

1 Rule 11(a) of Rules Governing § 2254 Actions, Certificate of Appealability, provides:

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

10 Here, given the Court’s ruling on a settled legal issue regarding jurisdiction, the Court
11 does not require any arguments from the parties on whether a COA should issue.

12 Under 28 U.S.C. § 2253(c)(2), a COA may issue “only if the applicant has made a
13 substantial showing of the denial of a constitutional right.” Here, the Court dismissed the
14 petition on the ground without prejudice that it was a second or successive petition not
15 authorized in advance in writing by the Ninth Circuit. Thus, the Court’s determination of
16 whether a COA should issue is governed by *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595,
17 146 L. Ed. 2d 542 (2000), where the Supreme Court held that,

18 [w]hen the district court denies a habeas petition on procedural grounds without
19 reaching the prisoner’s underlying constitutional claim, a COA should issue when
20 the prisoner shows, at least, that jurists of reason would find it debatable whether
21 the petition states a valid claim of the denial of a constitutional right and that
22 jurists of reason would find it debatable whether the district court was correct in its
23 procedural ruling.

24 529 U.S. at 484. As the Supreme Court further explained:

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

1 529 U.S. at 485. **The Court is mindful that it “must resolve doubts about the propriety of a**
2 **COA in the petitioner’s favor.”** *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002)
3 (citing *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) (en banc)); *accord Elliott v.*
4 *US*, 2016 WL 409817, *1 (E.D. Tex. Feb. 3, 2016) (“Any doubt regarding whether to grant a
5 [COA] is resolved in favor of the movant,”) (citing *Miller v. Johnson*, 200 F.3d 274, 280-
6 81 (5th Cir. 2000)), *appeal filed*, No. 16-40276 (5th Cir. Feb. 22, 2016). **But no such doubt**
7 **exists here.** None of petitioner’s claims is “adequate to deserve encouragement to proceed
8 further”, *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 3385 n.4 (1983), because
9 “jurists of reason would” not “find it debatable whether the district court was correct in its
10 procedural ruling” that the Court has no jurisdiction over this petition until and unless petitioner
11 secures advance written authorization from the Ninth Circuit to file the petition here.

12
13 **ORDER**

14 **Pursuant to Ninth Circuit Rule 22-3(a), the Court refers the petition to the U.S.**
15 **Court of Appeals for the Ninth Circuit for consideration as an application for leave to file**
16 **a second-or-successive habeas petition.**

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18 “Petitioner is advised that this referral alone does not constitute compliance with Circuit
19 Rule 22-3 and 28 U.S.C. section 2255(h). Petitioner must still file a motion for leave to proceed
20 in the Court of Appeals and make the requisite showing” to convince the Circuit to grant him
21 leave to file this second-or-successive petition. *See Todd v. US*, 2012 WL 5350012, *3 (W.D.
22 Wash. Oct. 4, 2012) (Theiler, M.J.), *R&R adopted*, 2012 WL 5351845 (W.D. Wash. Oct. 29,
23 2012) (Robart, J.); *accord US v. Raul Zavala*, 2016 WL 3033726, *1 (E.D. Wash. May 26,
24 2016) (Suko, J.); *Norris v. State of Wash.*, 2015 WL 7280592, *1 (E.D. Wash. Oct. 7, 2015)
25 (John Rodgers, M.J.), *R&R adopted*, 2015 WL 7283129 (E.D. Wash. Nov. 17, 2015)).
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1 **“Petitioner is directed to consult this statute and Ninth Circuit Rule 22-3 for further**
2 **information.”** *Larue v. Wash. State Dep’t of Corrs.*, 2008 WL 5245980, *1 (E.D. Wash. Dec.
3 15, 2008).
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6 **The Clerk shall send a copy of the habeas petition and a copy of this Order to the**
7 **Clerk of the U.S. Court of Appeals for the Ninth Circuit.**
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9 **The Clerk shall provide petitioner with a form recommended by the Ninth Circuit**
10 for filing an Application for Leave to File Second or Successive Petition Under 28 U.S.C. §
11 2254 or Motion Under 28 U.S.C. § 2255.
12

13 **This action is dismissed without prejudice for lack of subject-matter jurisdiction**
14 pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the U.S. District Courts.
15

16 **The Court DECLINES to issue a certificate of appealability.**
17

18 **Petitioner may seek a COA from the U.S. Court of Appeals for the Ninth Circuit.**
19 *Accord Juniper v. Zook*, 2016 WL 413099, *1 (E.D. Va. Feb. 2, 2016).² “This Court intimates
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21 ²

22 *See* Rule 11(a) of Rules Governing Sec. 2254 Cases (stating, in pertinent part, “If the court denies
23 a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals
24 under [Fed. R. App. P.] 22.”); Fed. R. App. P. 22(b)(1) (providing, in pertinent part, “If the district judge
25 has denied the certificate, the applicant may request a circuit judge to issue it.”); 9th Cir. R. 22-1(d).
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1 no opinion as to whether the U.S. Court of Appeals will consider such a COA request to be
2 timely." *US v. Zepeda*, 2017 WL 385551, *2 (C.D. Cal. Jan. 27, 2017).

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5 Dated: Tuesday, March 28, 2017



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7 VALERIE BAKER FAIRBANK
8 Senior United States District Judge
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