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

MARK WASHINGTON,	)	No. CV 16-9336 PSG (FFM)
	)	
Petitioner,	)	<b>ORDER SUMMARILY</b>
v.	)	<b>DISMISSING PETITION FOR</b>
	)	<b>LACK OF SUBJECT MATTER</b>
DAVE DAVEY, Warden,	)	<b>JURISDICTION</b>
	)	<b>REFERRING THE PETITION TO</b>
Respondent.	)	<b>THE U.S. COURT OF APPEALS</b>
	)	<b>PURSUANT TO NINTH CIRCUIT</b>
	)	<b>RULE 22-3(A);</b>
	)	<b>DENYING A CERTIFICATE OF</b>
	)	<b>APPEALABILITY</b>

**DISMISSAL OF HABEAS PETITION WITHOUT PREJUDICE**

On or about December 19, 2016, Petitioner Mark Washington (“Petitioner”) filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Petition”), pursuant to 28 U.S.C. § 2254. (Dkt. 1.) The Petition challenges Petitioner’s 2003 conviction for armed robbery and other crimes. (*Id.* at 2.)

The Court takes judicial notice of its files with respect to a prior habeas petition (the “Prior Petition”) <sup>1</sup> Petitioner filed in this Court on or about February 17, 2006, in

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<sup>1</sup> 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 Case No. CV 06-996-PSG-FFM. The Court notes that the Prior Petition attacked the  
2 same conviction and sentence as the present Petition. On September 13, 2011, the Prior  
3 Petition was dismissed on the merits with prejudice.

4 The pending Petition is governed by the provisions of the Antiterrorism and  
5 Effective Death Penalty Act of 1996 (Pub. L. No. 104-132, 110 Stat. 1214) (“AEDPA”)  
6 which became effective April 24, 1996. Section 106 of the AEDPA amended 28 U.S.C.  
7 § 2244(b) to read, in pertinent part, as follows:

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

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

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

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

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

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

27 The Prior Petition was denied on the merits. Therefore, because the Petition now  
28 pending challenges the same conviction as Petitioner’s Prior Petition, it constitutes a

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

8  
9 **“REFERRAL” OF HABEAS CORPUS PETITION TO NINTH CIRCUIT**

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

14 Therefore, to the extent the Petition was “mistakenly submitted” to this Court, the  
15 Petition must be referred to the court of appeals. However, it is unclear whether the  
16 district court may both “refer” the Petition to the Ninth Circuit and, at the same time,  
17 dismiss the Petition. After reviewing numerous district court cases in this circuit, this  
18 Court concludes that simultaneous referral and dismissal is appropriate. *See, e.g., Cielto*  
19 *v. Hedgpeth*, 2014 WL 1801110 (C.D. Cal. Apr. 23, 2014).

20  
21 **DENIAL OF CERTIFICATE OF APPEALABILITY**

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

23 (a) Certificate of Appealability. The district court must issue or deny a  
24 certificate of appealability when it enters a final order adverse to the  
25 applicant. Before entering the final order, the court may direct the parties to  
26 submit arguments on whether a certificate should issue. If the court issues a  
27 certificate, the court must state the specific issue or issues that satisfy the  
28 showing required by 28 U.S.C. § 2253(c)(2). If the court denies a  
certificate, the parties may not appeal the denial but may seek a certificate

1 from the court of appeals under Federal Rule of Appellate Procedure 22. A  
2 motion to reconsider a denial does not extend the time to appeal.

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

6 Under 28 U.S.C. § 2253(c)(2), a COA may issue “only if the applicant has made a  
7 substantial showing of the denial of a constitutional right.” Here, the Court dismissed  
8 the petition on the ground that it was a second or successive petition. Thus, the Court’s  
9 determination of whether a COA should issue is governed by the Supreme Court’s  
10 decision in *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000),  
11 where the Supreme Court held that,

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

17 529 U.S. at 484.

18 As the Supreme Court further explained:

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

23 529 U.S. at 485.

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

27 ///

28 ///

1 **ORDER**

2 Pursuant to Ninth Circuit Rule 22-3(a), the Court refers the habeas Petition to the  
3 U.S. Court of Appeals for the Ninth Circuit for consideration as an application for leave  
4 to file a second-or-successive habeas petition. The Clerk of Court shall send a copy of  
5 the habeas Petition and a copy of this Order to the Clerk of the U.S. Court of Appeals for  
6 the Ninth Circuit.

7 The Clerk of Court shall provide petitioner with a form recommended by the  
8 Ninth Circuit for filing an Application for Leave to File Second or Successive Petition  
9 Under 28 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255.

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

13  
14 LET JUDGMENT BE ENTERED ACCORDINGLY.

15 A certificate of appealability is denied.

16  
17 DATED: 1/18/17



18  
19 PHILIP S. GUTIERREZ  
20 United States District Judge

21 Presented by:

22 /S/FREDERICK F. MUMM  
23 FREDERICK F. MUMM  
24 United States Magistrate Judge