

1 Based on its review of the Petition, as well as information derived from the
2 docket of the United States District Court, Central District of California, it appeared
3 to the Court that the Petition herein constituted a second or successive petition under
4 28 U.S.C. § 2244(d), as petitioner previously sought habeas relief from the same 2007
5 Los Angeles County Superior Court judgment of conviction in a petition filed in this
6 Court, Case No. CV 11-06026-JAK (DTB) (the “Prior Action”). On September 17,
7 2012, Judgment was entered in the Prior Action dismissing that petition with
8 prejudice. Petitioner filed a notice of appeal from that Judgment on November 7,
9 2012, and the Ninth Circuit affirmed the Judgment on October 29, 2013.

10 Therefore, on May 22, 2017, the Court issued an Order to Show Cause (“OSC”)
11 ordering petitioner to show cause as to why the Court should not recommend that this
12 action be dismissed on the ground that petitioner failed to secure an order from the
13 Ninth Circuit authorizing the District Court to consider the Petition, prior to his filing
14 of it in this Court. On June 12, 2017, petitioner filed his Response to the OSC. In his
15 Response, petitioner acknowledges that the Court is correct as to the nature of the
16 instant Petition and that he has filed an application for permission to file a second or
17 successive petition with the Ninth Circuit. (Response at 1.) Petitioner requests that
18 the Court “wait and see what the Ninth Circuit does with the ‘Application for
19 permission motion’” before ruling on the OSC. (*Id.*)

20 21 **DISCUSSION**

22 **I. The Court lacks jurisdiction to consider the Petition as it is second or** 23 **successive to his prior petitions.**

24 The Court has considered petitioner’s Response to the OSC and rules as
25 follows: The Petition pending constitutes a second or successive petition under the
26 Antiterrorism and Effective Death Penalty Act of 1996 (the “AEDPA”). Specifically,
27 under the AEDPA, 28 U.S.C. § 2244(b) reads, in pertinent part, as follows:

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

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

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

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

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

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

22
23 Thus, the Petition now pending constitutes a second and/or successive petition
24 challenging the same conviction as the Prior Action in Case No. CV 11-06026-JAK
25 (DTB), within the meaning of 28 U.S.C. § 2244(b). As such, it was incumbent on
26 petitioner under § 2244(b)(3)(A) to secure an order from the Ninth Circuit authorizing
27 the District Court to consider the Petition, **prior** to his filing of it in this Court.
28 Petitioner’s failure to do so deprives the Court of subject matter jurisdiction. See

1 Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001). Moreover, since the Court
2 does not have jurisdiction to consider the Petition, it also lacks jurisdiction to consider
3 petitioner’s request to “wait and see what the Ninth Circuit does with the ‘Application
4 for permission motion.’”

5 For the foregoing reasons, IT IS ORDERED that this action be summarily
6 dismissed, pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the
7 United States District Courts.

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9 **II. Denial of Certificate of Appealability**

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

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

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22 Under 28 U.S.C. § 2253(c)(2), a certificate of appealability (“COA”) may issue
23 “only if the applicant has made a substantial showing of the denial of a constitutional
24 right.” Here, the Court dismissed the Petition on the ground that it was a second or
25 successive petition. Thus, the Court’s determination of whether a COA should issue
26 is governed by the Supreme Court’s decision in Slack v. McDaniel, 529 U.S. 473, 120
27 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), where the Supreme Court held that, “[w]hen
28 the district court denies a habeas petition on procedural grounds without reaching the

