

1 **PRIOR PROCEEDINGS**

2 On June 17, 2002, a Los Angeles County Superior Court jury found Petitioner guilty
3 of one count of attempted kidnapping (Cal. Penal Code §§ 664/207(a)), two counts of
4 assault by means likely to produce great bodily injury (Cal. Penal Code § 245(a)(1), one
5 count of first degree burglary (Cal. Penal Code § 459), two counts of sexual penetration by a
6 foreign object (Cal. Penal Code § 289(a)(1)), one count of forcible rape (Cal. Penal Code §
7 261(a)(2), one count of sodomy by use of force (Cal. Penal Code § 286(c)(2), one count of
8 forcible oral copulation (Cal. Penal Code § 288a(c)(2), and one count of first degree robbery
9 (Cal. Penal Code § 211). The jury also found the forcible oral copulation occurred during
10 the commission of a burglary within the meaning of Cal. Penal Code § 460(a) and Petitioner
11 engaged in the tying or binding of the victim within the meaning of Cal. Penal Code §
12 667.61(e)(2) and (e)(6). (Clerk’s Transcript [“CT”] at 258-71; Reporter’s Transcript [“RT”] at
13 1506:5-1510:6.) In a bifurcated proceeding, the trial court found Petitioner had suffered six
14 prior serious felony convictions under the Three Strikes Law and three prior felonies within
15 the meaning of Cal. Penal Code § 667(a). (CT at 351-54; RT at 1514:9-1519:25.)
16 Petitioner was sentenced to an aggregate term of 515 years to life in state prison. (CT at
17 351-57; RT at 1536:6-1540:10.)

18 On March 22, 2006, Petitioner filed in the First Habeas Action in this Court. On
19 November 3, 2009, the First Habeas Action was denied on the merits and dismissed with
20 prejudice.

21 **DISCUSSION**

22 **I. Duty to Screen**

23 This Court has a duty to screen habeas corpus petitions. See Rules Governing §
24 2254 Cases in the United States District Courts, Rule 4 Advisory Committee Notes. Rule 4
25 requires a district court to examine a habeas corpus petition, and if it plainly appears from
26 the face of the petition and any annexed exhibits that the petitioner is not entitled to relief,
27 the judge shall make an order for summary dismissal of the petition. Id.; see also Local
28 Rule 72-3.2.

1 **II. Successive Petition**

2 The Petition must be dismissed as a successive petition over which this Court lacks
3 jurisdiction. The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)
4 amended 28 U.S.C. § 2244(b) to read, in pertinent part, as follows:

5 (b)(1) A claim presented in a second or successive habeas
6 corpus application under section 2254 that was presented in a prior
7 application shall be dismissed.

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

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

14 (B)(i) the factual predicate for the claim could not have
15 been discovered previously through the exercise of due
16 diligence; and [¶] (ii) the facts underlying the claim, if proven and
17 viewed in light of the evidence as a whole, would be sufficient to
18 establish by clear and convincing evidence that, but for
19 constitutional error, no reasonable factfinder would have found
20 the applicant guilty of the underlying offense.

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

25 28 U.S.C. § 2244(b)(1)-(3)(A); see also Rule 9 of the Rules Governing § 2254 Cases in the
26 United States District Courts.

27 AEDPA “greatly restricts the power of federal courts to award relief to state prisoners
28 who file second or successive habeas corpus applications.” Tyler v. Cain, 533 U.S. 656,

1 661 (2001). AEDPA “creates a ‘gatekeeping’ mechanism for the consideration of second or
2 successive applications in district court.” Felker v. Turpin, 518 U.S. 651, 657 (1996); see
3 also Stewart v. Martinez-Villareal, 523 U.S. 637, 641 (1998). Second or successive habeas
4 petitions are subject to the “extremely stringent” requirements of AEDPA. Babbitt v.
5 Woodford, 177 F.3d 744, 745 (9th Cir. 1999).

6 “Before a second or successive application permitted by this section is filed in the
7 district court, the applicant shall move in the appropriate court of appeals for an order
8 authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A).
9 Second or successive habeas petitions filed in the district court without an authorizing order
10 from the court of appeals shall be dismissed. See 28 U.S.C. § 2244(b); see also Burton v.
11 Stewart, 549 U.S. 147, 153 (2007) (where petitioner neither sought nor received
12 authorization from Court of Appeals before filing second or successive petition, district court
13 should have dismissed petition for lack of jurisdiction). “When the AEDPA is in play, the
14 district court may not, in the absence of proper authorization from the court of appeals,
15 consider a second or successive habeas application.” Cooper v. Calderon, 274 F.3d 1270,
16 1274 (9th Cir. 2001) (quoting Libby v. Magnusson, 177 F.3d 43, 46 (1st Cir. 1999)).

17 Here, Petitioner challenges the same State Court Conviction that he challenged in
18 the First Habeas Action. That case was dismissed with prejudice. Under AEDPA, Petitioner
19 was required to obtain an order from the Ninth Circuit authorizing the Court to consider his
20 claims prior to filing this case. Because he did not do so, this Court is without jurisdiction to
21 entertain the Petition. Burton, 549 U.S. at 153; see also 28 U.S.C. § 2244(b)(3)(A).¹

22 **CERTIFICATE OF APPEALABILITY**

23 _____
24 ¹ Ninth Circuit Rule 22-3(a) provides that “if an application for authorization to file a
25 second or successive section 2254 petition . . . is mistakenly submitted to the district court,
26 the district court shall refer it to the court of appeals.” In this case, there is no indication that
27 the instant Petition is actually an application for authorization to file a second or successive
28 petition that was mistakenly filed here, and the Court declines to construe it as such. If
Petitioner seeks authorization to file a successive habeas petition, he should submit his
application directly to the Ninth Circuit Court of Appeals in compliance with Ninth Circuit
Rule 22-3.

1 Under AEDPA, a state prisoner seeking to appeal a district court's final order in a
2 habeas corpus proceeding must obtain a Certificate of Appealability ("COA") from the district
3 judge or a circuit judge. 28 U.S.C. § 2253(c)(1)(A). A COA may issue "only if the applicant
4 has made a substantial showing of the denial of a constitutional right." Id. at § 2253(c)(2);
5 accord Williams v. Calderon, 83 F.3d 281, 286 (9th Cir. 1996). "A petitioner satisfies this
6 standard by demonstrating that jurists of reason could disagree with the district court's
7 resolution of his constitutional claims or that jurists could conclude the issues presented are
8 adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S.
9 322, 327 (2003); see also Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

10 When a district court dismisses a petition on procedural grounds, the reviewing court
11 should apply a two-step analysis, and a COA should issue if the petitioner can show both:
12 (1) "that jurists of reason would find it debatable whether the district court was correct in its
13 procedural ruling[;]" and (2) "that jurists of reason would find it debatable whether the
14 petition states a valid claim of the denial of a constitutional right[.]" Slack, 529 U.S. at 478.

15 The Court is dismissing the Petition without prejudice because it is a second or
16 successive petition. Since the Petition is clearly a second or successive petition, Petitioner
17 cannot make the requisite showing "that jurists of reason would find it debatable whether the
18 district court was correct in its procedural ruling." Slack, 529 U.S. at 478.

19 ///

20 ///

21 ///

22 ///

23 ///

24

25

26

27

28

ORDER

Based on the foregoing, IT IS ORDERED THAT:

1. The Petition is **dismissed without prejudice** for lack of jurisdiction;
2. A Certificate of Appealability is **denied**.

DATED: October 12, 2017



MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28