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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CALVIN LEONARD SHARP,
Petitioner,
v.
STUART SHERMAN, et al,
Respondent.

No. CV 18-2235-GW(FFM)
ORDER SUMMARILY DISMISSING
PETITION FOR WRIT OF HABEAS
CORPUS FOR LACK OF SUBJECT
MATTER JURISDICTION;
REFERRING THE PETITION TO THE
U.S. COURT OF APPEALS PURSUANT
TO NINTH CIRCUIT RULE 22-3(A);

DENYING A CERTIFICATE OF
APPEALABILITY

DISMISSAL OF HABEAS PETITION WITHOUT PREJUDICE

On or about January 6, 2018, petitioner Calvin Leonard Sharp (“Petitioner”) constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Petition”).¹ Petitioner challenges a conviction and sentence imposed by the California Superior Court for the County of Ventura in 2012 (Ventura Superior Court Case No. 2008014330).

¹ A pro se prisoner’s relevant filings may be construed as filed on the date they were submitted to prison authorities for mailing, under the prison “mailbox rule” of *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379 (1988). In this case, although the Petition was filed by the Court on January 12, 2018, a proof of service attached to the Petition is dated January 6, 2018. Therefore, the Court will assume that the Petition was constructively filed no later than January 6, 2018.

1 The Court takes judicial notice of its files with respect to a prior habeas
2 petition (the “Prior Petition”) Petitioner filed in this Court on April 12, 2016,
3 Case No. CV 16-2504 GW (AJW). The Court notes that the Prior Petition was
4 directed to the same conviction and/or sentence sustained in Ventura County
5 Superior Court in 2012. On November 15, 2017, Judgment was entered in Case
6 No. CV 16-2504 GW (AJW) dismissing the Prior Petition as untimely.

7 The Petition now pending is governed by the provisions of the
8 Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110 Stat.
9 1214) (“the Act”) which became effective April 24, 1996. Section 106 of the Act
10 amended 28 U.S.C. § 2244(b) to read, in pertinent part, as follows:

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

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

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

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

24 (ii) the facts underlying the claim, if proven and
25 viewed in light of the evidence as a whole, would be
26 sufficient to establish by clear and convincing evidence
27 that, but for constitutional error, no reasonable

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1 factfinder would have found the applicant guilty of the
2 underlying offense.

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

7 Therefore, because the Petition now pending challenges the same
8 conviction as Petitioner’s Prior Petition, it constitutes a second and/or successive
9 petition within the meaning of 28 U.S.C. § 2244(b). To the extent Petitioner seeks
10 to pursue the same claims he previously asserted, the Petition is barred by the
11 provisions of 28 U.S.C. § 2244(b)(1). To the extent Petitioner seeks to pursue
12 claims not previously asserted, it was incumbent on him under § 2244(b)(3)(A) to
13 secure an order from the Ninth Circuit authorizing the District Court to consider
14 the Petition, prior to his filing of it in this Court. Petitioner’s failure to secure
15 such an order from the Ninth Circuit deprives the Court of subject matter
16 jurisdiction.

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

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

23 Therefore, to the extent the Petition was “mistakenly submitted” to this
24 Court, the Petition must be referred to the court of appeals. However, it is unclear
25 whether the district court may both “refer” the Petition to the Ninth Circuit and, at
26 the same time, dismiss the Petition. After reviewing numerous district court cases

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1 in this circuit, this Court concludes that simultaneous referral and dismissal is
2 appropriate. *See Cielto v. Hedgpeth*, 2014 WL 1801110 (C.D. Cal. Apr. 23,
3 2014).

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5 **DENIAL OF CERTIFICATE OF APPEALABILITY**

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

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

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

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

1 reaching the prisoner’s underlying constitutional claim, a COA should issue when
2 the prisoner shows, at least, that jurists of reason would find it debatable whether
3 the petition states a valid claim of the denial of a constitutional right and that
4 jurists of reason would find it debatable whether the district court was correct in
5 its procedural ruling.” 529 U.S. at 484. As the Supreme Court further explained:

6 Section 2253 mandates that both showings be made before the court
7 of appeals may entertain the appeal. Each component of the §
8 2253(c) showing is part of a threshold inquiry, and a court may find
9 that it can dispose of the application in a fair and prompt manner if it
10 proceeds first to resolve the issue whose answer is more apparent
11 from the record and arguments.

12 529 U.S. at 485.

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

16
17 **ORDER**

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

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

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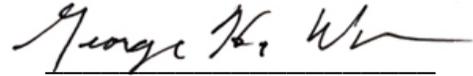
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1 This action is dismissed without prejudice for lack of subject-matter
2 jurisdiction pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the
3 United States District Courts.

4 LET JUDGMENT BE ENTERED ACCORDINGLY.

5 A certificate of appealability is denied.

6
7 DATED: April 11, 2018



8 GEORGE H. WU
9 United States District Judge

10
11 Presented by:

12 /S/ FREDERICK F. MUMM
13 FREDERICK F. MUMM
14 United States Magistrate Judge