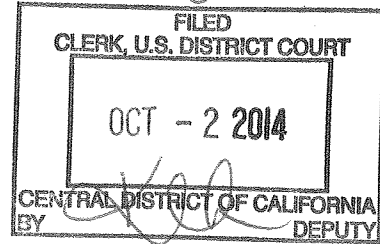


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I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED: 10.2.14  
[Signature]  
DEPUTY CLERK



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CURTIS SMITH, ) Case No. EDCV 14-1074-GW (RNB)  
Petitioner, )  
vs. ) ORDER SUMMARILY DISMISSING  
M.E. SPEARMAN, ) PETITION FOR WRIT OF HABEAS  
Respondent. ) CORPUS FOR LACK OF SUBJECT  
MATTER JURISDICTION

Petitioner is a California prisoner, currently serving a 28-years-to-life sentence based on a conviction sustained in Riverside County Superior Court Case No. BLF001710 for attempted murder, kidnapping, assault, residential burglary, and corporal injury to a spouse. On February 28, 2008, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody directed to that conviction in Case No. EDCV 08-264-GW (RNB) [the "Prior Action"]. On January 29, 2010, Judgment was entered by this Court in the Prior Action denying the Petition and dismissing the action with prejudice. Concurrently, the Court issued an Order denying a Certificate of Appealability. Although petitioner filed a timely Notice of Appeal, the Ninth Circuit subsequently denied petitioner's request for a Certificate of Appealability.

Petitioner has now purported to file another Petition for Writ of Habeas Corpus by a Person in State Custody that also purports to be directed to his conviction in

1 Riverside County Superior Court Case No. BLF001710. As best the Court can glean  
2 from the Petition, petitioner is claiming that he received ineffective assistance of  
3 counsel in connection with a guilty plea that petitioner originally had entered to the  
4 charges against him. However, the Court knows from the Prior Action that petitioner  
5 successfully appealed from the judgment of conviction stemming from his guilty plea  
6 and that the matter was remanded to the trial court to allow petitioner to withdraw his  
7 guilty plea. See also People v. Smith, 2003 WL 21588040 (Cal. App. July 11, 2003).  
8 Petitioner did so, and opted to go to trial with a jury. His current custodial status  
9 stems from the outcome of that jury trial.

10 Accordingly, to the extent that petitioner is challenging the original judgment  
11 of conviction stemming from his guilty plea that was reversed on appeal, the Court  
12 lacks subject matter jurisdiction to entertain the Petition because petitioner is not “in  
13 custody” pursuant to that reversed judgment of conviction. See Maleng v. Cook, 490  
14 U.S. 488, 490-91, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989); Carafas v. LaVallee,  
15 391 U.S. 234, 238, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968); see also Cole v. Cate,  
16 2010 WL 514863, at \*24 (S.D. Cal. Oct. 21, 2010), Report and Recommendation  
17 Adopted by 2010 WL 5148440 (S.D. Cal. Dec. 14, 2010) (“[B]ecause the state court  
18 reversed the convictions Cole seeks to challenge here, albeit on grounds other than  
19 sufficiency of the evidence, he cannot challenge the state court’s determination that  
20 there was sufficient evidence to show he was a broker dealer because he does not  
21 satisfy the ‘in custody’ requirement as to those counts.”).

22 To the extent that the Petition constitutes a challenge to the judgment of  
23 conviction resulting in his current custodial status, the Court’s consideration of it is  
24 governed by 28 U.S.C. § 2244(b), which provides in pertinent part:

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

28 (2) A claim presented in a second or successive habeas corpus

1 application under section 2254 that was not presented in a prior  
2 application shall be dismissed unless—

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

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

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

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

19 Since the ineffective assistance of counsel claim now being alleged by  
20 petitioner qualifies as a new claim that was not presented in the Prior Action, it was  
21 incumbent on petitioner under § 2244(b)(3)(A) to secure an order from the Ninth  
22 Circuit authorizing the District Court to consider the Petition, prior to his filing of it  
23 in this Court. Petitioner’s failure to do so deprives the Court of subject matter  
24 jurisdiction. See Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001), cert.  
25 denied, 538 U.S. 984 (2003).

26 //


27 //

28 //

1 IT THEREFORE IS ORDERED that this action be summarily dismissed  
2 pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States  
3 District Courts for lack of subject matter jurisdiction.

4 LET JUDGMENT BE ENTERED ACCORDINGLY.

5  
6 DATED: Sept. 26, 2014

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10 GEORGE H. WU  
11 UNITED STATES DISTRICT JUDGE

12 Presented by:

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14 \_\_\_\_\_  
15 Robert N. Block  
16 United States Magistrate Judge  
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