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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

8 || DAVID COMBS,

**Petitioner,**

No. C 10-5549 PJH (PR)

vs.

11 GARY SWARTHOUT, Warden,  
12 Responder

**ORDER DISMISSING  
PETITION AS SECOND OR  
SUCCESSIVE AND DENYING  
CERTIFICATE OF  
APPEALABILITY**

14 This is a habeas case filed pro se by a state prisoner. It is directed to petitioner's  
15 2002 conviction for inflicting corporal injury on a spouse, felony false imprisonment, first-  
16 degree burglary, and assault with a deadly weapon. Petitioner had a previous habeas  
17 case in this court, *Combs v. Carey*, C 06-0186 MMC (PR), directed to the same  
18 conviction. It was denied on the merits in an order entered on October 30, 2008, and the  
19 denial was affirmed on appeal. Petitioner's petition for a writ of certiorari in that case is  
20 pending in the United States Supreme Court.

21 A habeas petitioner may not file a second or successive petition unless he or she  
22 first obtains from the appropriate United States Court of Appeals an order authorizing the  
23 filing. See 28 U.S.C. § 2244(b)(3)(A). Petitioner has not obtained such an order from  
24 the Ninth Circuit. And that he has a certiorari petition is pending in the Supreme Court  
25 does not prevent this petition from being second or successive. See *Ochoa v. Sirmons*,  
26 485 F.3d 538, 540-41 (10th Cir. 2000) (holding that second petition is still barred as  
27 second or successive even if decision in first habeas case is pending on appeal).

28 The petition is accordingly **DISMISSED** without prejudice to filing a new petition if

1 petitioner obtains the necessary order. The pending motion for appointment of counsel  
2 (document number 8 on the docket) is **DENIED** as moot.

3 Because reasonable jurists would not find the court's ruling debatable or wrong, a  
4 certificate of appealability is **DENIED**. See Rule 11(a), Rules Governing § 2254 Cases,  
5 28 U.S.C. foll. § 2254; see also 28 U.S.C. § 2253(c) (COA requirement); *Slack v.*  
6 *McDaniel*, 529 U.S. 473, 483 (2000) (standard). Petitioner is advised that he may not  
7 appeal the denial of a COA, but he may ask the court of appeals to issue a COA under  
8 Rule 22 of the Federal Rules of Appellate Procedure. See Rule 11(a), Rules Governing  
9 § 2254 Cases.

10 The clerk shall close the file.

11 **IT IS SO ORDERED.**

12 Dated: August 30, 2011.



13 **PHYLLIS J. HAMILTON**  
United States District Judge

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