

1
2
3
4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA
5

6 BENJAMIN SALOFI ASAELI,

Petitioner,

7 v.
8

9 JEFFREY UTTECHT,

Respondent.
10

CASE NO. C14-5991 BHS

ORDER DECLINING TO ADOPT
REPORT AND
RECOMMENDATION IN PART
AND DISMISSING PETITION

11 This matter comes before the Court on the Report and Recommendation (“R&R”)
12 of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 4), and
13 Petitioner Benjamin Salofi Asaeli’s (“Asaeli”) objections to the R&R (Dkt. 5).

14 On December 18, 2014, Asaeli filed a motion to proceed *in forma pauperis* and a
15 proposed petition for a writ of habeas corpus. Dkts. 1 & 1-1. On December 23, 2014,
16 Judge Strombom issued the R&R recommending that, pursuant to Ninth Circuit Rule of
17 Procedure 23(a), the Court refer the petition to the Ninth Circuit because the petition is a
18 second or successive petition. Dkt. 4. On January 13, 2015, Asaeli filed objections
19 stating that “the record is clear” that this is a second or successive petition. Dkt. 5 at 1.
20 Asaeli argues that the petition should be allowed because his first petition is still on
21 appeal and successive petitions are allowed on claims that have yet to yield a
22

1 determination on the merits. *Id.* (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637
2 (1998)).

3 The district judge must determine de novo any part of the magistrate judge's
4 disposition that has been properly objected to. The district judge may accept, reject, or
5 modify the recommended disposition; receive further evidence; or return the matter to the
6 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

7 First, the Court disagrees that Ninth Circuit Civil Rule 23(a) controls the
8 determination of this petition. That rule provides that “[i]f a second or successive
9 petition or motion, or application for leave to file such a petition or motion, is *mistakenly*
10 submitted to the district court, the district court shall refer it to the court of appeals.”
11 Circuit Rule 23(a) (emphasis added). There is no indication in Asaeli's petition or leave
12 to file a petition that he mistakenly filed either with the district court. In fact, Asaeli
13 states in his objections, which were not before Judge Strombom, that the record is clear
14 that this is a second or successive petition. Therefore, Asaeli's petition was intentionally
15 filed in this Court and the Court declines to adopt the portion of the R&R applying
16 Circuit Rule 23(a).

17 Second, a determination whether a petition is a second or successive petition is a
18 final order of the district court subject to review on appeal. In such cases, the Ninth
19 Circuit assumes jurisdiction pursuant to 28 U.S.C. § 2253 and conducts a *de novo* review.
20 *See Richey v. Sinclair*, 585 Fed. Appx. 636 (9th Cir. 2014). Moreover, the Court must
21 also pass upon the issue of whether a certificate of appealability shall issue. *Id.*
22 Therefore, it appears that 28 U.S.C. § 2241(b)(1) controls the determination of whether

1 an intentionally filed petition is a second or successive petition and whether the Court
2 shall dismiss such a petition.

3 Third, it is undisputed that Asaeli's petition is a second or successive petition that
4 is subject to dismissal. Asaeli, however, argues that the Supreme Court has created an
5 exception for petitions that include claims that have yet to yield a determination on the
6 merits. Dkt. 5. at 1. In *Stewart*, the Court allowed a petitioner to present a claim for the
7 second time where the district court initially dismissed the claim without prejudice for
8 failure to exhaust administrative remedies. *Stewart*, 523 U.S. at 644–645. *Stewart* is
9 distinguishable because Asaeli has presented his claim and the district court's decision is
10 currently pending appeal. Asaeli fails to provide any authority for the proposition that he
11 is entitled to a second petition when the first petition is currently on appeal. Therefore,
12 the Court dismisses Asaeli's petition as a second or successive petition.

13 The Court having considered the R&R, Asaeli's objections, and the remaining
14 record, does hereby find and order as follows:

- 15 (1) The Court **DECLINES to ADOPT** the R&R in part;
- 16 (2) **DISMISSES** Asaeli's petition as a second or successive petition;
- 17 (3) **DENIES** a Certificate of Appealability; and
- 18 (4) The Clerk shall close this case.

19 Dated this 18th day of February, 2015.

20
21 

22
BENJAMIN H. SETTLE
United States District Judge