

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

MAR 15 2019

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

GUSTAVO GOMEZ,

Petitioner-Appellant,

v.

STATE OF CALIFORNIA,

Respondent-Appellee.

No. 18-56640

D.C. No. 2:18-cv-07041-JEM  
Central District of California,  
Los Angeles

ORDER

Before: CANBY and WARDLAW, Circuit Judges.

The motion for reconsideration (Docket Entry No. 5) is denied. *See* 9th Cir.

R. 27-10.

No further filings will be entertained in this closed case.

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ORDER

Before: CANBY and GRABER, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2);

*Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

**DENIED.**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GUSTAVO GOMEZ,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

Case No. CV 18-7041-JEM

ORDER SUMMARILY DISMISSING  
PETITION FOR WRIT OF HABEAS  
CORPUS AND DENYING CERTIFICATE  
OF APPEALABILITY

On August 15, 2018, Gustavo Gomez ("Petitioner"), filed a petition for writ of habeas corpus ("Petition"), in which he challenges his 1987 conviction for second degree murder and seeks to have the Ventura County District Attorney's Office provide him with certain documents. (See Petition at 1-2; 4-7.)

**PRIOR PROCEEDINGS**

On July 16, 1987, in Ventura County Superior Court, Petitioner was convicted of one count of murder in violation of Cal. Penal Code § 187, with a finding that he personally used a deadly and dangerous weapon, a knife, at the time of the offense within the meaning of Cal. Penal Code § 12022(b). (Report and Recommendation of United States Magistrate Judge ("R&R"), filed January 22, 2001, Gomez v. Duncan, Warden, Case No. CV 99-9741

1 AHM (BQR), at 2; see also Petition at 1-2.)<sup>1</sup> Petitioner was sentenced to 15 years to life,  
 2 plus one year for the enhancement, to be served consecutive to a federal sentence that he  
 3 was serving in Minnesota. (R&R at 2.)

4 On September 23, 1999, Petitioner filed a petition for writ of habeas corpus by a  
 5 person in state custody, pursuant to 28 U.S.C. § 2254, in this Court, Gomez v. Duncan,  
 6 Warden, Case No. CV 99-9741 AHM (BQR) ("1999 Petition"), challenging his 1987  
 7 conviction and/or sentence in Ventura County Superior Court. (R&R at 2-3.) Respondent  
 8 filed an Answer to the 1999 Petition and a Motion to Dismiss the 1999 Petition on October  
 9 19, 1999, and November 18, 1999, respectively. Petitioner filed a Traverse and an  
 10 Opposition to the Motion to Dismiss on December 8, 1999. On January 22, 2001, the Court  
 11 issued a R&R, recommending that the 1999 Petition be denied and dismissed as untimely.  
 12 (R&R at 1-7.) The District Court accepted the R&R and dismissed the 1999 Petition on  
 13 March 1, 2001. (See Judgment, Gomez v. Duncan, Warden, Case No. CV 99-9741 AHM  
 14 (BQR).)

15 On August 15, 2018, Petitioner filed the instant Petition, in which he again appears to  
 16 challenge his 1987 conviction and/or sentence in Ventura County Superior Court. (Petition  
 17 at 1-2.) Petitioner also argues that he is entitled to certain documents that are in the  
 18 possession of the Ventura County District Attorney's Office. (Id. at 4.)

### 19 DISCUSSION

20 This Court has a duty to screen habeas corpus petitions. See Rules Governing §  
 21 2254 Cases in the United States District Courts, Rule 4 Advisory Committee Notes. Rule 4  
 22 requires a district court to examine a habeas corpus petition, and if it plainly appears from  
 23 the face of the petition and any annexed exhibits that the petitioner is not entitled to relief,  
 24 the judge shall make an order for summary dismissal of the petition. Id.; see also Local

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25  
 26 <sup>1</sup> The Court takes judicial notice of the files and records in Gomez v. Duncan,  
 27 Warden, Case No. CV 99-9741 AHM (BQR). See United States v. Wilson, 631 F.2d 118,  
 28 119 (9th Cir. 1980) ("In particular, a court may take judicial notice of its own records in other  
 cases, as well as the records of an inferior court in other cases."); accord United States v.  
Howard, 381 F.3d 873, 876 n.1 (9th Cir. 2004).

1 Rule 72-3.2. The notes to Rule 4 state: “a dismissal may be called for on procedural  
2 grounds, which may avoid burdening the respondent with the necessity of filing an answer  
3 on the substantive merits of the petition.” See Boyd v. Thompson, 147 F.3d 1124, 1127-28  
4 (9th Cir. 1998); White v. Lewis, 874 F.2d 599, 602-03 (9th Cir. 1989).

5 **I. THE PETITION IS SUBJECT TO SUMMARY DISMISSAL AS A SECOND OR**  
6 **SUCCESSIVE PETITION TO THE EXTENT PETITIONER CHALLENGES HIS 1987**  
7 **CONVICTION AND/OR SENTENCE IN VENTURA COUNTY SUPERIOR COURT**

8 The present Petition is governed by the provisions of the Antiterrorism and Effective  
9 Death Penalty Act of 1996 (“AEDPA”). AEDPA amended 28 U.S.C. § 2244(b) to read, in  
10 pertinent part, as follows:

11 (b)(1) A claim presented in a second or successive habeas  
12 corpus 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 rule  
18 of constitutional law, made retroactive to cases on collateral  
19 review by the Supreme Court, that was previously unavailable; or

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

27 (3)(A) Before a second or successive application permitted by  
28 this section is filed in the district court, the applicant shall move in the

1 appropriate court of appeals for an order authorizing the district court to  
2 consider the application.

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

5 To the extent Petitioner challenges his 1987 conviction and/or sentence in Ventura  
6 County Superior Court, the instant Petition is a second or successive petition. "If an  
7 application is 'second or successive,' the petitioner must obtain leave from the Court of  
8 Appeals before filing it with the district court." Magwood v. Patterson, 561 U.S. 320, 330-31  
9 (2010). There is no indication in the record that Petitioner has obtained permission from the  
10 Ninth Circuit Court of Appeals to file a second or successive petition.<sup>2</sup> "When the AEDPA is  
11 in play, the district court may not, in the absence of proper authorization from the court of  
12 appeals, consider a second or successive habeas application." Cooper v. Calderon, 274  
13 F.3d 1270, 1274 (9th Cir. 2001) (per curiam) (internal quotation marks and citation omitted);  
14 accord Burton v. Stewart, 549 U.S. 147, 152 (2007) (per curiam). Because the Petition is a  
15 "second or successive" petition, the Court cannot consider it on the merits. See Magwood,  
16 561 U.S. at 331 ("if [petitioner's] application [is] 'second or successive,' the District Court  
17 [must] dismiss[] it in its entirety because [petitioner] failed to obtain the requisite  
18 authorization from the Court of Appeals[]"); accord Burton, 549 U.S. at 152. Accordingly,  
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23 <sup>2</sup> Ninth Circuit Rule 22-3(a) provides that "if an application for authorization to file a  
24 second or successive section 2254 petition . . . is mistakenly submitted to the district court,  
25 the district court shall refer it to the court of appeals." Rule 22-3(a) also permits the district  
26 court to refer a second or successive 2254 petition to the Ninth Circuit in the interests of  
27 justice. In this case, there is no indication that the instant Petition is actually an application  
28 for authorization to file a second or successive petition that was mistakenly filed here, and  
the Court declines to construe it as such. The Court also does not find that it is in the  
interests of justice to refer the Petition to the Ninth Circuit under Rule 22-3(a). 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 the Court will dismiss the Petition without prejudice to Petitioner filing a new action if and  
 2 when he obtains permission to file a successive petition.<sup>3</sup>

3 **II. THE PETITION IS SUBJECT TO SUMMARY DISMISSAL FOR FAILURE TO**  
 4 **STATE A COGNIZABLE HABEAS CLAIM**

5 To the extent that Petitioner seeks to obtain certain documents from the Ventura  
 6 County District Attorney's Office, that request is not properly brought as a claim for habeas  
 7 relief because it does not challenge the validity of Petitioner's conviction or the length of his  
 8 sentence.

9 A district court will entertain a habeas petition "in behalf of a person in custody  
 10 pursuant to the judgment of a State court only on the ground that he is in custody in  
 11 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).  
 12 "Challenges to the validity of any confinement or to particulars affecting its duration are the  
 13 province of habeas corpus." Hill v. McDonough, 547 U.S. 574, 579 (2006) (quoting  
 14 Muhammad v. Close, 540 U.S. 749, 750 (2004) (per curiam)); see also Docken v. Chase,  
 15 393 F.3d 1024, 1026 (9th Cir. 2004) ("[C]hallenges implicating the fact or duration of  
 16 confinement must be brought through a habeas petition."); Badea v. Cox, 931 F.2d 573, 574  
 17 (9th Cir. 1991) (prisoner should challenge "legality or duration" of confinement in habeas  
 18 corpus proceeding).

19 On the face of the Petition, it is clear that Petitioner's claim that he is entitled to  
 20 receive certain documents does not challenge the fact or duration of his confinement.  
 21 Accordingly, his claim is not cognizable on federal habeas review and should be dismissed.  
 22 To the extent that Petitioner is stating that he has submitted an appropriate Freedom of  
 23 Information Act ("FOIA") request to obtain certain documents from the Ventura County  
 24  
 25

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26 <sup>3</sup> If Petitioner obtains permission to file a second petition, he should file a new  
 27 petition for writ of habeas corpus. He should not file an amended petition in this action or  
 28 use the case number from this action because the instant action is being closed today.  
 When Petitioner files a new petition, the Court will give the petition a new case number.

1 District Attorney's Office but his request has been improperly denied; he may be able to  
2 pursue the remedies afforded him through FOIA.<sup>4</sup> See 5 U.S.C. § 552.

3 **CERTIFICATE OF APPEALABILITY**

4 Pursuant to Rule 11 of the Rules Governing Section 2254 cases, the Court "must  
5 issue or deny a certificate of appealability when it enters a final order adverse to the  
6 applicant."

7 The Court has found that the Petition should be dismissed without prejudice. For the  
8 reasons stated above, the Court concludes that Petitioner has not made a substantial  
9 showing of the denial of a constitutional right, as is required to support the issuance of a  
10 certificate of appealability. See 28 U.S.C. § 2253(c)(2).

11 **ORDER**

12 IT IS HEREBY ORDERED that: (1) the Petition is dismissed without prejudice; and  
13 (2) a certificate of appealability is denied.

14 IT IS SO ORDERED.

15  
16 DATED: November 30, 2018

/s/ John E. McDermott  
JOHN E. MCDERMOTT  
UNITED STATES MAGISTRATE JUDGE

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28 <sup>4</sup> The Court expresses no opinion and makes no ruling as to Petitioner's right under  
FOIA or any other applicable law to obtain the documents he seeks.