

1 refer the Current Federal Petition to the United States Court of Appeals for the
2 Ninth Circuit (the “Ninth Circuit”) pursuant to Ninth Circuit Rule 22-3(a).¹

3 **II. PROCEDURAL HISTORY²**

4 **A. State Court Conviction and Direct Appeal**

5 On November 4, 1994, a Los Angeles County Superior Court jury convicted
6 petitioner of two counts of robbery and found true an allegation that petitioner had
7 been convicted of certain felonies. On February 7, 1995, the trial court sentenced
8 petitioner to thirty-six years to life in state prison.

9 Petitioner appealed his conviction to the California Court of Appeal, which
10 affirmed the judgment on March 7, 1996. Petitioner thereafter filed a petition for
11 review in the California Supreme Court, which was denied on May 22, 1996.³

14 ¹Ninth Circuit Rule 22-3(a) provides in pertinent part: “Any petitioner seeking
15 authorization to file a second or successive 2254 petition . . . in the district court must file an
16 application in the Court of Appeals demonstrating entitlement to such leave under 28 U.S.C.
17 § 2254 If a second or successive petition . . . is mistakenly submitted to the district court,
the district court shall refer it to the [C]ourt of [A]ppeals.”

18 ²The facts and procedural history set forth in this section are derived from court records
19 in the Central District of California, the Ninth Circuit, and the United States Supreme Court in
20 the following cases of which this Court takes judicial notice: (1) Tracy Miles v. Anthony A.
21 Lamarque, No. CV 00-8763 RSWL(SGL) (“First Federal Petition” or “First Federal Action”);
22 (2) Tracy Miles v. James E. Hall, No. CV 03-9110 DDP(SGL) (“Second Federal Petition” or
23 “Second Federal Action”); (3) Tracy Miles v. Silva H. Garcia, No. CV 10-5326 DDP(JC)
24 (“Third Federal Petition” or “Third Federal Action”); (4) Tracy Miles v. Anthony Lamarque,
25 No. 01-55338 (“First Ninth Circuit Action”); (5) Tracy Miles v. Anthony A. Lamarque,
26 No. 02-73335 (“Second Ninth Circuit Action”); (6) Tracy Miles v. James E. Hall, No. 06-55980
27 (“Third Ninth Circuit Action”); (7) Tracy Miles v. Silva Garcia, No. 11-70278 (“Fourth Ninth
28 Circuit Action”); (8) Tracy Miles v. David Long, No. 12-71017 (“Fifth Ninth Circuit Action”);
and (9) Trac[]y Miles v. Anthony Lamarque, No. 01-5460 (“U.S. Supreme Court Action”). See
Fed. R. Evid. 201; Harris v. County of Orange, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (court
may take judicial notice of undisputed matters of public record including documents on file in
federal or state courts).

³Petitioner thereafter sought and was denied habeas relief in state court. (Current Federal
Petition at 4-5).

1 **B. First Federal Action, First Ninth Circuit Action, and**
2 **U.S. Supreme Court Action**

3 On August 17, 2000, petitioner filed the First Federal Petition in which he
4 challenged the judgment in the State Case. On January 16, 2001, judgment was
5 entered denying and dismissing the First Federal Petition with prejudice, because it
6 was untimely.

7 On April 13, 2001, the Ninth Circuit denied petitioner's request for a
8 certificate of appealability in the First Ninth Circuit Action. On May 22, 2001, the
9 Ninth Circuit denied petitioner's motion for reconsideration.

10 On October 1, 2001, the United States Supreme Court denied petitioner's
11 petition for a writ of certiorari in the U.S. Supreme Court Action.

12 **C. Second Ninth Circuit Action**

13 On December 13, 2002, the Ninth Circuit denied petitioner's application for
14 leave to file a second or successive petition in the Second Ninth Circuit Action.

15 **D. Second Federal Action and Third Ninth Circuit Action**

16 On December 15, 2003, petitioner filed the Second Federal Petition in
17 which he again challenged the judgment in the State Case. On January 8, 2004,
18 judgment was entered summarily dismissing the Second Federal Petition because it
19 was successive.

20 On October 4, 2006, the Ninth Circuit denied petitioner's request for a
21 certificate of appealability in the Third Ninth Circuit Action.

22 **E. Third Federal Action and Fourth Ninth Circuit Action**

23 On July 20, 2010, petitioner filed the Third Federal Petition in which he
24 again challenged the judgment in the State Case. On January 20, 2011, judgment
25 was entered dismissing the Third Federal Petition because it was successive. The
26 Court concurrently denied petitioner a certificate of appealability, but referred the
27 matter to the Ninth Circuit pursuant to Ninth Circuit Rule 22-3(a).

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1 On April 19, 2011, the Ninth Circuit denied petitioner leave to file a second
2 or successive petition in the Fourth Ninth Circuit Action.

3 **F. Fifth Ninth Circuit Action**

4 On April 2, 2012, in the Fifth Ninth Circuit Action, petitioner again filed an
5 application seeking leave to file a second or successive petition. On June 14, 2012,
6 the Ninth Circuit denied such application.

7 **G. Current Federal Petition**

8 As noted above, on August 20, 2014, petitioner filed the Current Federal
9 which again challenges the judgment in the State Case. The record does not reflect
10 that petitioner has obtained authorization from the Ninth Circuit to file the Current
11 Federal Petition in District Court.⁴

12 **III. DISCUSSION**

13 Before a habeas petitioner may file a second or successive petition in a
14 district court, he must apply to the appropriate court of appeals for an order
15 authorizing the district court to consider the application. Burton v. Stewart, 549
16 U.S. 147, 152-53 (2007) (citing 28 U.S.C. § 2244(b)(3)(A)). This provision
17 “creates a ‘gatekeeping’ mechanism for the consideration of second or successive
18 applications in district court.” Felker v. Turpin, 518 U.S. 651, 657 (1996); see also
19 Reyes v. Vaughn, 276 F. Supp. 2d 1027, 1028-30 (C.D. Cal. 2003) (discussing
20 applicable procedures in Ninth Circuit). A district court lacks jurisdiction to
21 consider the merits of a second or successive habeas petition in the absence of
22 proper authorization from a court of appeals. Cooper v. Calderon,
23 274 F.3d 1270, 1274 (9th Cir. 2001) (per curiam) (citing United States v. Allen,
24 157 F.3d 661, 664 (9th Cir. 1998)), cert. denied, 538 U.S. 984 (2003).

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28 ⁴A search of the court’s PACER system reflects no activity by petitioner in the Ninth
Circuit other than as detailed above.

1 The court of appeals may authorize the filing of a second or successive
2 petition only if it determines that the petition makes a prima facie showing that at
3 least one claim within the petition satisfies the requirements of 28 U.S.C.
4 Section 2244(b), *i.e.*, that a claim which was not presented in a prior application (1)
5 relies on a new rule of constitutional law, made retroactive to cases on collateral
6 review by the Supreme Court; or (2) the factual predicate for the claim could not
7 have been discovered previously through the exercise of due diligence and the facts
8 underlying the claim would be sufficient to establish that, but for constitutional
9 errors, no reasonable factfinder would have found the applicant
10 guilty of the underlying offense. Nevius v. McDaniel, 104 F.3d 1120, 1120-21
11 (9th Cir. 1997); Nevius v. McDaniel, 218 F.3d 940, 945 (9th Cir. 2000).

12 A second or subsequent habeas petition is not considered “successive” if the
13 initial habeas petition was dismissed for a technical or procedural reason, rather
14 than on the merits. See Slack v. McDaniel, 529 U.S. 473, 485-487 (2000) (second
15 habeas petition not “successive” if initial habeas petition dismissed for failure to
16 exhaust state remedies); Stewart v. Martinez-Villareal, 523 U.S. 637, 643-645
17 (1998) (second habeas petition not “successive” if claim raised in first habeas
18 petition dismissed as premature); but see McNabb v. Yates, 576 F.3d 1028, 1030
19 (9th Cir. 2009) (dismissal on statute of limitations grounds constitutes disposition
20 on the merits rendering subsequent petition “second or successive”); Henderson v.
21 Lampert, 396 F.3d 1049, 1053 (9th Cir.) (dismissal on procedural default grounds
22 constitutes disposition on the merits rendering subsequent petition “second or
23 successive”), cert. denied, 546 U.S. 884 (2005); Plaut v. Spendthrift Farm, Inc.,
24 514 U.S. 211, 228 (1995) (dismissal for failure to prosecute treated as judgment on
25 the merits) (citations omitted).

26 Petitioner’s First Federal Petition was denied as untimely – a determination
27 which the Ninth Circuit has deemed to constitute a disposition on the merits. See
28 McNabb, 576 F.3d at 1030. Accordingly, the Current Federal Petition, like the

1 Second and Third Federal Petitions, is successive. Since petitioner filed the
2 Current Federal Petition without authorization from the Ninth Circuit, this Court
3 lacks jurisdiction to consider it.

4 **IV. ORDER**

5 IT IS THEREFORE ORDERED that the Current Federal Petition is denied
6 and this action is dismissed without prejudice. The Clerk of the Court is directed
7 to refer the Current Federal Petition to the Ninth Circuit pursuant to Ninth Circuit
8 Rule 22-3(a).

9 IT IS SO ORDERED.

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11 DATED: September 11, 2014



14 HONORABLE DEAN D. PREGERSON
15 UNITED STATES DISTRICT JUDGE
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