

1 May 6, 2010, petitioner filed a Notice of Appeal from that Judgment. However, his
2 request for a certificate of appealability was denied in turn by this Court and the
3 Ninth Circuit affirmed the Judgment on December 3, 2012.

4 The Petition now pending is governed by the provisions of the Antiterrorism
5 and Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110 Stat. 1214) (“the
6 Act”), which became effective April 24, 1996. Section 106 of the Act amended 28
7 U.S.C. § 2244(b) to read, in pertinent part, as follows:

8 (1) A claim presented in a second or successive habeas corpus
9 application under section 2254 that was presented in a prior application
10 shall be dismissed.

11 (2) A claim presented in a second or successive habeas corpus
12 application under section 2254 that was not presented in a prior
13 application shall be dismissed unless--

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

17 (B)(I) the factual predicate for the claim could not
18 have been discovered previously through the exercise of due
19 diligence; and

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


25 (3) (A) Before a second or successive application permitted
26 by this section is filed in the district court, the applicant shall
27 move in the appropriate court of appeals for an order authorizing
28 the district court to consider the application.

1 Here, petitioner has not alleged, much less shown, that the instant Petition falls
2 within any of the exceptions enumerated at 28 U.S.C. § 2244(b). Thus, the Petition
3 now pending constitutes a second and/or successive petition challenging the same
4 judgment of conviction as the Prior Action, within the meaning of 28 U.S.C. §
5 2244(b), as the Prior Action was denied on the merits. See McNabb v. Yates, 576
6 F.3d 1028, 1030 (9th Cir. 2009) (holding that dismissal of a habeas petition as time
7 barred under 28 U.S.C. § 2244(d)(1) constitutes a disposition on the merits and
8 renders a subsequent petition second or successive for purposes of 28 U.S.C. §
9 2244(b)). Therefore, to the extent that petitioner is now purporting to raise new
10 claims, it was incumbent on him under § 2244(b)(3)(A) to secure an order from the
11 Ninth Circuit authorizing the District Court to consider those claims, prior to his
12 filing of the instant Petition in the District Court. Petitioner's failure to secure such
13 leave prior to his filing of the Petition herein deprives the Court of subject matter
14 jurisdiction. See Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001), cert.
15 denied, 538 U.S. 984 (2003).


16 For the foregoing reasons, IT IS ORDERED that this action be summarily
17 dismissed, pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the
18 United States District Courts.

19 LET JUDGMENT BE ENTERED ACCORDINGLY.

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21 DATED: August 27, 2013

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PERCY ANDERSON
UNITED STATES DISTRICT JUDGE

25 Presented by:

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David T. Bristow
United States Magistrate Judge