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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL ANTHONY MILLER,  
Petitioner,  
v.  
M. BITER,  
Respondent.

) Case No. CV 14-5752 R(JC)

)  
) ORDER DENYING PETITION FOR  
) WRIT OF HABEAS CORPUS AND  
) DISMISSING ACTION WITHOUT  
) PREJUDICE  
)

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**I. SUMMARY**

On July 24, 2014, petitioner Michael Anthony Miller filed a Petition for Writ of Habeas Corpus (the “Current Federal Petition”) challenging a Los Angeles County Superior Court judgment in Pasadena, California (the “State Case” or “State Conviction”) on multiple grounds. (Current Federal Petition at 2, 5-6). The Current Federal Petition reflects that petitioner has previously sought, and been denied federal habeas relief relative to the State Conviction. (Current Federal Petition at 7).

Based on the record and the applicable law, the Current Federal Petition should be denied and this action should be dismissed without prejudice for lack of

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1 jurisdiction because petitioner did not obtain the requisite authorization from the  
2 Court of Appeals to file a successive petition.<sup>1</sup>

3 **II. PROCEDURAL HISTORY<sup>2</sup>**

4 **A. State Court Conviction**

5 On December 22, 2000, a Los Angeles County Superior Court jury found  
6 petitioner guilty of one count of corporal injury to a spouse, one count of assault by  
7 means likely to produce great bodily injury and one count of false imprisonment by  
8 violence in connection with the July 15, 2000 beating of petitioner's wife. The  
9 jury further found true allegations that petitioner's current convictions included a  
10 serious felony, and that petitioner had two prior serious or violent felony  
11 convictions withing the meaning of California's Three Strikes law. On July 25,  
12 2001, the trial court sentenced petitioner to 25 years to life in state prison.

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17 <sup>1</sup>In light of the pre-filing review ordered issued against petitioner by the United States  
18 Court of Appeals for the Ninth Circuit (the "Ninth Circuit") in Case No. 10-80047, and the fact  
19 that the Ninth Circuit has denied petitioner leave to file a second or successive habeas corpus  
20 petition on multiple occasions (Ninth Circuit Case Nos. 09-72486, 09-72833, 10-80047), the  
Court refrains from directing the Clerk of the Court to forward the Current Federal Petition to the  
Ninth Circuit pursuant to Ninth Circuit Rule 22-3(a).

21 <sup>2</sup>The facts and procedural history set forth herein are derived from court records in  
22 multiple Ninth Circuit cases referenced in the text above and of which the Court takes judicial  
23 notice and from court records in the Central District of California in the following cases of which  
24 the Court takes judicial notice: (1) Michael A. Miller v. Leroy Baca, No. CV 01-1053 R(Mc)  
25 ("First Federal Action"); (2) Michael A. Miller v. CA Dept. Corrections, et al., No. CV 02-6406  
26 R(Mc) ("Second Federal Action"); (3) Michael A. Miller v. Edward Alameda, No. CV 03-4206  
27 R(Mc) ("Third Federal Action"); (4) Michael A. Miller v. Department of Corrections Director, et  
28 al., No. CV 04-9355 R(JC) (the "Fourth Federal Action"); (5) Michael A. Miller v. State of  
California, et al., No. CV 09-4837 R(JC) ("Fifth Federal Action"); and (6) Michael A. Miller v.  
M.D. Biter, No. CV 12-3258 R(JC) ("Sixth Federal Action"). See Fed. R. Evid. 201; United  
States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980) (court may take judicial notice of its own  
records in other cases).

1           **B.     First Federal Action**

2           On December 5, 2001, petitioner filed in the Central District of California, a  
3           Petition for Writ of Habeas Corpus by a Person in State Custody in Case No.  
4           01-1053 R(Mc) (“First Federal Petition”) challenging the State Conviction. On  
5           January 8, 2002, judgment was entered dismissing the First Federal Petition  
6           without prejudice based on petitioner’s failure to exhaust available state remedies.

7           **C.     Second Federal Action**

8           On August 15, 2002, petitioner filed in the Central District of California, a  
9           second Petition for Writ of Habeas Corpus by a Person in State Custody in Case  
10          No. 02-6406 R(Mc) (“Second Federal Petition”) challenging the State Conviction.  
11          On April 14, 2003, judgment was once again entered dismissing the Second  
12          Federal Petition without prejudice based on petitioner’s failure to exhaust available  
13          state remedies.

14          **D.     Third Federal Action**

15          On June 13, 2003, petitioner filed in the Central District of California, a  
16          third Petition for Writ of Habeas Corpus by a Person in State Custody in Case No.  
17          CV 03-4206 R(Mc) (“Third Federal Petition”) challenging the State Conviction.  
18          On March 25, 2004, judgment was entered dismissing the Third Federal Petition  
19          without prejudice as a mixed petition.

20          **E.     Fourth Federal Action**

21          On October 3, 2005, petitioner filed in the Central District of California, an  
22          operative First Amended Petition for Writ of Habeas Corpus by a Person in State  
23          Custody in Case No. CV 04-9355 R(JC) (“Fourth Federal Petition”). The  
24          Fourth Federal Petition again challenged the State Conviction, asserting thirty-six  
25          (36) grounds for relief. On July 25, 2007, the assigned Magistrate Judge issued a  
26          Report and Recommendation recommending that the Fourth Federal Petition be  
27          denied on the merits and that the Fourth Federal Action be dismissed with  
28          prejudice. This Court adopted such Report and Recommendation, and judgment

1 was entered denying the Fourth Federal Petition and dismissing the Fourth Federal  
2 Action on August 27, 2007. On September 26, 2008, the Ninth Circuit denied  
3 petitioner's request for a certificate of appealability in Case No. 07-56360.<sup>3</sup>

4 **F. Fifth Federal Action and Subsequent Ninth Circuit Actions**

5 On July 7, 2009, a Petition for Writ of Habeas Corpus submitted by  
6 petitioner was transferred to and filed in the Central District of California in Case  
7 No. 09-4837 R(JC) ("Fifth Federal Petition").<sup>4</sup> The Fifth Federal Petition again  
8 challenged the State Conviction. On August 6, 2009, judgment was entered  
9 denying the Fifth Federal Petition and dismissing the Fifth Federal Action without  
10 prejudice because the Fifth Federal Petition was successive and the record did not  
11 reflect that petitioner had obtained authorization from the Ninth Circuit to file it.

12 On October 19, 2009, the Ninth Circuit denied petitioner leave to file a  
13 second or successive habeas corpus petition in the Central District of California in  
14 Case No. 09-72833.<sup>5</sup>

15 On May 19, 2010, in Case No. 10-80047, the Ninth Circuit entered a pre-  
16 filing order restricting petitioner's future pro se filings in the Ninth Circuit and  
17 directing petitioner to follow specified procedures relative to any such future  
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21 <sup>3</sup>Petitioner has filed and the Court has rejected multiple post-judgment motions in the  
22 Fourth Federal Action. See, e.g., Fourth Federal Action Docket Nos. 123, 124, 126, 127, 130,  
131, 132, 133, 134, 135, 136, 137, 140, 141, 144.

23 <sup>4</sup>The Fifth Federal Petition was originally filed in the Ninth Circuit in Case No. 09-71657  
24 on June 1, 2009, and transferred to the Eastern District of California pursuant to Federal Rule of  
25 Appellate Procedure 22(a) on June 24, 2009. On July 6, 2009, the Eastern District of California  
ordered the matter transferred to the Central District of California.

26 <sup>5</sup>On September 15, 2009, the Ninth Circuit construed a Petition for Writ of Mandate filed  
27 by petitioner against the Eastern District of California, but involving a challenge to the  
28 conviction in the State Case in issue here, as an application for authorization to file a second or  
successive habeas petition and denied it in Case No. 09-72486.

1 filings.<sup>6</sup> In the same case, the Ninth Circuit subsequently found that petitioner’s  
2 application for permission to file a second or successive habeas corpus petition was  
3 so insubstantial as to not warrant further review and declined to permit it to  
4 proceed.

5 On April 13, 2011, the Ninth Circuit denied petitioner’s request for a  
6 certificate of appealability in Case No. 09-56433.

7 **G. Sixth Federal Action**

8 On April 17, 2012, a Petition for Writ of Habeas Corpus submitted by  
9 petitioner was transferred to and filed in the Central District of California in Case  
10 No. 12-3258 R(JC) (“Sixth Federal Petition”). The Sixth Federal Petition again  
11 challenged the State Conviction. On April 27, 2012, judgment was entered  
12 denying the Sixth Federal Petition and dismissing the Sixth Federal Action without  
13 prejudice because the Sixth Federal Petition was successive and the record did not  
14 reflect that petitioner had obtained authorization from the Ninth Circuit to file it.  
15 This Court also denied petitioner a certificate of appealability. Petitioner did not  
16 seek further review.

17 **H. Current Federal Petition**

18 As noted above, on July 24, 2014, petitioner filed the Current Federal  
19 Petition which again challenges the State Conviction.<sup>7</sup> The record does not reflect  
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21 <sup>6</sup>Also on May 19, 2010, in Case No. 10-70795, the Ninth Circuit construed petitioner’s  
22 “motion to vacate void judgment,” which was directed to the Fifth Federal Action, as a petition  
23 for writ of mandamus and denied it.

24 <sup>7</sup>More specifically, petitioner appears to challenge the enhancement of his sentence with  
25 prior convictions, claiming (1) such convictions were not filed in an Information as required by  
26 California Penal Code section 667.7(b); (2) such convictions are constitutionally invalid because  
27 the jury in such underlying cases acquitted him of attempted voluntary manslaughter/attempted  
28 kidnapping conviction under California Penal Code section 207 was not punishable under  
California Penal Code section 208(b) and former section 208(d); and (3) the parole board found

(continued...)

1 that petitioner has obtained authorization from the Ninth Circuit to file the Current  
2 Federal Petition in District Court.<sup>8</sup>

### 3 **III. DISCUSSION**

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

16 The court of appeals may authorize the filing of a second or successive  
17 petition only if it determines that the petition makes a prima facie showing that at  
18 least one claim within the petition satisfies the requirements of 28 U.S.C.  
19 Section 2244(b), *i.e.*, that a claim which was not presented in a prior application (1)

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21 <sup>7</sup>(...continued)

22 that the alleged victim was not credible and that petitioner was the victim of the alleged victim  
23 who is a female sexual predator who had petitioner falsely imprisoned twice before based on  
24 fraud. (Petition at 5-6). To the extent petitioner’s third claim is intended to challenge a parole  
25 determination rather than the judgment in the underlying State Case, dismissal without prejudice  
26 is nonetheless appropriate because such claim is not cognizable on federal habeas review. See  
27 Swarthout v. Cooke, 131 S. Ct. 859, 862 (2011) (federal habeas court’s inquiry into whether  
28 person denied parole received due process is limited to determining whether the prisoner was  
allowed an opportunity to be heard and was provided a statement of the reasons why parole was  
denied).

<sup>8</sup>A search of the court’s PACER system does not reflect that petitioner has been granted  
leave to file a second or successive petition by the Ninth Circuit.

1 relies on a new rule of constitutional law, made retroactive to cases on collateral  
2 review by the Supreme Court; or (2) the factual predicate for the claim could not  
3 have been discovered previously through the exercise of due diligence and the facts  
4 underlying the claim would be sufficient to establish that, but for constitutional  
5 errors, no reasonable factfinder would have found the applicant  
6 guilty of the underlying offense. Nevius v. McDaniel, 104 F.3d 1120, 1120-21  
7 (9th Cir. 1997); Nevius v. McDaniel, 218 F.3d 940, 945 (9th Cir. 2000).

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

22         Petitioner’s Fourth Federal Petition was dismissed on the merits.  
23 Accordingly, like the Fifth and Sixth Federal Petitions, the Current Federal Petition  
24 is successive. Since petitioner filed the Current Federal Petition without  
25 authorization from the Ninth Circuit, this Court lacks jurisdiction to consider it.

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1 **IV. ORDER**

2 IT IS THEREFORE ORDERED that the Current Federal Petition is denied  
3 and this action is dismissed without prejudice.

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5 DATED: JULY 31, 2014



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7 HONORABLE MANUEL L. REAL  
8 UNITED STATES DISTRICT JUDGE  
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