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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**LARRY DARNELL TAYLOR,**

**Petitioner,**

v.

**A.M. GONZALES, Warden,**

**Respondent.**

**Case No. LA CV 14-06394-VBF-JC**

**Opinion & Order**

Referring Petition to U.S. Court of Appeals as  
Required by Ninth Cir. R. 22-3(a);

Dismissing Habeas Corpus Petition Without  
Prejudice Due to Petitioner’s Failure to Obtain  
Leave to File From Ninth Circuit

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**I. SUMMARY**

On August 14, 2014, petitioner Larry Darnell Taylor (“petitioner”), a California prisoner who is proceeding pro se, formally filed a Petition for Writ of Habeas Corpus (the “current federal petition”). The current federal petition challenges petitioner’s 2009 conviction following a jury trial in Los Angeles County Superior Court (the “State Case” or “State Conviction”).

Based on the record (including facts as to which this Court takes judicial notice as detailed below) and the applicable law, this action will be dismissed without prejudice for lack of jurisdiction because petitioner did not obtain the requisite authorization from the Court of Appeals to file a second-or-successive federal habeas petition. Further, the Clerk of the Court is directed to refer the current federal petition to the United States Court of Appeals for the Ninth Circuit (“the Ninth Circuit”) pursuant to Ninth Circuit Rule 22-3(a).

1 **II. PROCEDURAL HISTORY<sup>1</sup>**

2 **A. State Proceedings**

3 On July 16, 2009, a Los Angeles County Superior Court jury convicted petitioner of the sale,  
4 transportation, or offer to sell cocaine base—a violation of California Health and Safety Code section  
5 11352(a). On August 14, 2009, the trial court sentenced petitioner to fourteen years in state prison.

6 On June 8, 2011, the California Court of Appeal affirmed the judgment as to petitioner. On  
7 August 17, 2011, the California Supreme Court denied review.

8 Petitioner thereafter sought and was denied habeas relief in the Los Angeles County Superior  
9 Court, the California Court of Appeal and the California Supreme Court.

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

11 On October 4, 2011, petitioner filed the First Federal Petition in which he challenged his  
12 conviction in the State Case on multiple grounds. The parties to the First Federal Action consented  
13 to having the then-assigned United States Magistrate Judge (“Magistrate Judge”) conduct all  
14 proceedings in such action. On April 18, 2012, the Magistrate Judge issued a Memorandum Opinion  
15 and Order denying the First Federal Petition on the merits and directing that judgment be entered  
16 accordingly. On April 19, 2012, judgment was entered denying the petition and dismissing the first  
17 federal action with prejudice. Petitioner filed a Notice of Appeal on May 2, 2012. On April 23,

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19 <sup>1</sup>  
20 The facts and procedural history set forth in this section are derived from the current petition  
and/or court records in the following cases of which this Court takes judicial notice:

- 21 (1) Central District of California Case – *Larry Darnell Taylor v. Tim Busby, Warden*,  
22 No. CV 11-8523-OP (“first federal petition” or “first federal action”);
- 23 (2) Ninth Circuit Case – *Larry Darnell Taylor v. Timothy E. Busby, Warden*, No. 12-  
24 55838 (“Ninth Circuit action”); and
- 25 (3) U.S. Supreme Court Case – *Larry Darnell Taylor v. David Long, Warden*, No. 12-  
26 10370 (“Supreme Court action”).

27 *See* Fed. R. Evid. 201; *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 689 n.1 (9th Cir. 2011) (“[A]  
28 court may take judicial notice of its own records in other cases, as well the records of an inferior  
court in other cases.”) (quoting *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980)).

1 2013, the Ninth Circuit denied petitioner’s request for a certificate of appealability (“COA”) in the  
2 Ninth Circuit Action. On October 7, 2013, the United States Supreme Court denied petitioner’s  
3 petition for a writ of certiorari in the U.S. Supreme Court Action.

4 **C. Current Federal Petition**

5 As noted above, on August 14, 2014, petitioner filed the Current Federal Petition which again  
6 challenges the judgment in the State Case. The record does not reflect that petitioner has obtained  
7 authorization from the Ninth Circuit to file the current federal petition in District Court.<sup>2</sup>

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9 **III. ANALYSIS: DISMISSAL DUE TO ABSENCE OF LEAVE TO FILE**

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

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

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<sup>2</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 21 (9th Cir. 1997); *Nevius v. McDaniel*, 218 F.3d 940, 945 (9th Cir. 2000).

2 A second or subsequent habeas petition is not considered “successive” if the initial habeas  
3 petition was dismissed for a technical or procedural reason, rather than on the merits. *See Slack v.*  
4 *McDaniel*, 529 U.S. 473, 485-487, 120 S. Ct. 1595 (2000) (second habeas petition not “successive”  
5 if initial habeas petition dismissed for failure to exhaust state remedies); *Stewart v.*  
6 *Martinez-Villareal*, 523 U.S. 637, 643-645, 118 S. Ct. 1618 (1998) (second habeas petition not  
7 “successive” if claim raised in first habeas petition dismissed as premature); *but see McNabb v.*  
8 *Yates*, 576 F.3d 1028, 1030 (9th Cir. 2009) (untimeliness dismissal constitutes disposition on the  
9 merits rendering subsequent petition “second or successive”); *Henderson v. Lampert*, 396 F.3d 1049,  
10 1053 (9th Cir. 2005) (dismissal on procedural-default grounds constitutes disposition on the merits  
11 for this purpose); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228, 115 S. Ct. 1447 (1995)  
12 (dismissal for failure to prosecute treated as judgment on the merits) (citations omitted).

13 Petitioner’s first federal petition was denied on its merits, not for a technical or procedural  
14 reason. Accordingly, the current federal petition is second or successive. Since petitioner filed the  
15 current federal petition without authorization from the Ninth Circuit, this Court lacks jurisdiction  
16 and must dismiss the habeas petition without prejudice on that basis.

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18 **IV. ANALYSIS: PETITION MUST BE REFERRED TO U.S. COURT OF APPEALS**

19 Ninth Circuit Rule 22-3(a) clearly states that “[a]ny petitioner seeking authorization to file  
20 a second or successive 2254 petition . . . in the district court must file an application in the Court of  
21 Appeals demonstrating entitlement to such leave under 28 U.S.C. § 2254 . . . . If a second or  
22 successive petition . . . is mistakenly submitted to the district court, the district court shall refer it to  
23 the [C]ourt of [A]ppeals.” It is a venerable principle of construction that the word “shall” indicates  
24 that the action is mandatory. *See Sebelius v. Auburn Regional Med. Ctr.*, – U.S. –, 133 S. Ct. 817,  
25 824 (2013); *Gonzales v. Thaler*, – U.S. –, 132 S. Ct. 641 (2012); *Nat’l Ass’n of Homebuilders v.*  
26 *Defenders of Wildlife*, 544 U.S. 644, 661, 127 S. Ct. 2518 (2007). “Therefore, when confronted with  
27 a second or successive habeas petition attacking the same conviction or sentence as a prior federal  
28 habeas petition which was denied on the merits, a district court has no choice but to ‘refer’ the

1 petition to the U.S. Court of Appeals for the Ninth Circuit.” *Smith v. United States*, ED CV 11-  
2 00521 Doc. 29 at 9 (C.D. Cal. July 23, 2014). Failure to do so would violate the plain language of  
3 Ninth Circuit Rule 22-3(a).

4 **The question then arises whether the Court can both “refer” this petition to the Ninth**  
5 **Circuit and then dismiss the action here without prejudice due to petitioner’s failure to obtain**  
6 **leave from the Circuit to file a second-or-successive habeas petition.** Petitioner’s failure to  
7 obtain leave to file from the Circuit justifies dismissal without prejudice, and Ninth Circuit Rule 22-  
8 3(a) plainly requires the Court to refer the petition to the Circuit. “Perceiving no legal or practical  
9 conflict between these two courses of action, the Court will continue its . . . practice of both  
10 dismissing the petition and referring it to the Circuit.” *Batchelor v. Yates*, No. LA CV 09-01752-  
11 VBF Doc. 41 at 9 (C.D. Cal. July 31, 2014); *see, e.g., Garcia v. Busby*, 2014 WL 2761333 (C.D. Cal.  
12 June 17, 2014); *Cielto v. Hedgpeth*, 2014 WL 1801110 (C.D. Cal. Apr. 23, 2014); *Valentine v.*  
13 *Lewis*, 2014 WL 1419292 (C.D. Cal. Apr. 14, 2014); *Edwards v. Koehn*, 2014 WL 1794932 (C.D.  
14 Cal. Apr. 11, 2014); *De Adams v. Hedgpeth*, 2014 WL 1806314 (C.D. Cal. Apr. 9, 2014).

15 **This is consistent with the practice of at least fourteen district judges in our district.**  
16 *See, e.g., Miles v. Gonzales*, 2014 WL 2014 WL 4543564 (C.D. Cal. Sept. 11, 2014) (Pregerson, J.);  
17 *Varnado v. Paramo*, 2014 WL 3845137 (C.D. Cal. Aug. 4, 2014) (Otero, J.); *Miller v. Biter*, 2014  
18 WL 3810234 (C.D. Cal. July 31, 2014) (Real, J.); *McKenzie v. Valenzuela*, 2014 WL 3109806 (C.D.  
19 Cal. July 7, 2014) (Snyder, J.); *Brock v. Montgomery*, 2014 WL 2812315, \*1 (C.D. Cal. June 23,  
20 2014) (O’Connell, J.) (“[T]his action is dismissed without prejudice for lack of jurisdiction because  
21 Petitioner did not obtain the requisite authorization from the Court of Appeals to file a successive  
22 petition. Further, the Clerk of Court is directed to refer the . . . Petition to the United States Court  
23 of Appeals . . . pursuant to Ninth Circuit Rule 22-3(a).”); *Perez v. Holland*, 2014 WL 1466857 (C.D.  
24 Cal. Apr. 14, 2014) (Carney, J.); *Castaneda v. Long*, 2014 WL 996490, \*1 (C.D. Cal. Mar. 13, 2014)  
25 (Anderson, J.); *Blanco v. Valenzuela*, 2014 WL 111453 (C.D. Cal. Jan. 9, 2014) (Walter, J.);  
26 *Parham v. Diaz*, 2013 WL 5310760, \*1 (C.D. Cal. Sept. 19, 2013) (Klausner, J.); *Reed v. Roe*, 2013  
27 WL 1970240, \*1 (C.D. Cal. May 10, 2013) (Wright, J.); *Jones v. Harris*, 2013 WL 1390036, \*1  
28 (C.D. Cal. Mar. 15, 2013) (Wilson, J.); *Jones v. Harrington*, 2012 WL 2573207, \*1 (C.D. Cal. June

1 29, 2012) (Gee, J.); *Olvera v. Gonzales*, 834 F. Supp.2d 944, 945 (C.D. Cal. 2011) (Hatter, Sr. J.);  
2 *Henderson v. Walker*, 2011 WL 1706775, \*1 (C.D. Cal. May 5, 2011) (Stotler, Sr. J.).

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4 **ORDER**

5 Pursuant to Ninth Circuit Rule 22-3(a), the Court **REFERS** this matter to the U.S. Court of  
6 Appeals for the Ninth Circuit for consideration as an application for leave to file a second-or-  
7 successive habeas petition.

8 The Clerk of Court **SHALL SEND** a copy of the habeas corpus petition and a copy of this  
9 Order to the U.S. Court of Appeals for the Ninth Circuit.

10 The Clerk of Court **SHALL PROVIDE** “petitioner with a form recommended by the Ninth  
11 Circuit for filing an Application for Leave to File Second or Successive Petition Under 28 U.S.C.  
12 § 2254 or Motion Under 28 U.S.C. § 2255.”<sup>3</sup>

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14 This action is then **DISMISSED without prejudice** due to petitioner’s failure to obtain leave  
15 from the Ninth Circuit to file a second-or-successive habeas corpus petition in this Court.

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17 The Court will deny a certificate of appealability by separate order issued contemporaneously  
18 with this order. Accordingly, while this is a final order, it will not be appealable unless petitioner  
19 obtains a certificate of appealability from the U.S. Court of Appeals.<sup>4</sup>


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21 <sup>3</sup>  
22 *See Walker v. Ryan*, 2014 WL 413055, \*2 (D. Ariz. Feb. 4, 2014); *accord Gwyn v. US*, 2014  
23 WL 1330029, \*1 (M.D. Fla. Apr. 1, 2014) (“The Clerk of Court is directed to send Petitioner the  
24 Eleventh Circuit’s application form for leave to file a second or successive § 2255 motion under 28  
25 U.S.C. § 2244(b).”).

26 <sup>4</sup>  
27 *See Muth v. Fondren*, 676 F.3d 815, 822 (9<sup>th</sup> Cir.) (citing 28 U.S.C. § 2253(c)(1)(B)), *cert.*  
28 *denied*, – U.S. –, 133 S. Ct. 292 (2012); *see also* FED. R. APP. P. 22(b)(1) (if district judge denies  
COA, applicant may request COA from a circuit judge). Finally, “the Defendant is not necessarily  
denied collateral review of the issues raised in the motion. He simply has to seek permission from  
the . . . Circuit before pursuing his claims in this Court.” *United States v. Wilson*, 950 F. Supp.2d  
(continued...)

1 As required by FED. R. CIV. P. 58(a), final judgment will be issued separately.

2 IT IS SO ORDERED.

3  
4 DATED: September 22, 2014

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8 VALERIE BAKER FAIRBANK  
9 UNITED STATES DISTRICT JUDGE  
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<sup>4</sup>(...continued)  
90, 96 (D.D.C. 2013).