

1 Superior Court¹ (Case No. TA030680). The Petition alleges the
2 following grounds for habeas relief: (1) "The identification of
3 the petitioner as a homicide suspect is so deficient it violates
4 the petitioner[']s due process rights of the U.S. Constitution.";
5 and (2) Petitioner received ineffective assistance of counsel
6 based on his appellate counsel's failure to argue, on appeal,
7 that Petitioner's convictions were the result of overly suggestive
8 identifications (Petition at 5-6, Attachment at 1-2 ["Declaration
9 of Innocence"], Memorandum of Points and Authorities at 1-8).

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11 **Prior Habeas Petitions Challenging 1995 Convictions**

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13 Petitioner has filed several habeas actions challenging the
14 same 1995 judgment entered by the Los Angeles Superior Court:

15
16 Case No. CV 98-04330-AAH (RZ)

17
18 On June 1, 1998, Petitioner filed a Petition for Writ of
19 Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C.
20 § 2254. See Christopher Sudduth v. Susan Yearwood, et al., Case
21 No. CV 98-04330-AAH; Docket Entry No. 1. On July 15, 1998, the
22 District court issued an Order and Judgment dismissing that habeas
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24 ¹ On January 24, 1995, a Los Angeles County Superior
25 Court jury convicted Petitioner of one count of first degree
26 murder and two counts of attempted murder. Petitioner was
27 sentenced to prison for 40 years to life for the murder
28 conviction and life with the possibility of parole for the
attempted murder convictions. (See Christopher D. Sudduth, Case
No. CV 98-08256-AHM (RZ); Docket No. 14 at 3).

1 petition without prejudice based on Petitioner's failure to
2 exhaust state remedies with respect to all claims alleged therein.
3 (Id.; Docket Entry Nos. 5-6).

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5 Case No. CV 98-08256-AHM (RZ)

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7 On October 8, 1998, Petitioner filed a Petition for Writ of
8 Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C.
9 § 2254. See Christopher D. Sudduth v. Robert Ayers, Jr., et al.,
10 Case No. CV 98-08256-AHM (RZ); Docket Entry No. 1. On June 29,
11 1999, the District court issued an Order and Judgment denying that
12 habeas petition with prejudice as untimely, in accordance with the
13 finding and conclusion of the Magistrate Judge (with one inserted
14 correction). (Id.; Docket Entry Nos. 14-15). On October 5, 2000,
15 the District court denied a certificate of appealability. (Id.;
16 Docket Entry No. 17).

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18 Case No. CV 00-07110-AHM (RZ)

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20 On June 6, 2000, Petitioner filed a Petition for Writ of
21 Habeas Corpus. See Christopher Sudduth v. Robert Ayers, et al.,
22 Case No. CV 00-07110-AHM (RZ); Docket Entry No. 1. On July 18,
23 2000, the District Court issued an Order summarily dismissing that
24 habeas petition without prejudice as an unauthorized successive
25 petition. (Id.; Docket Entry No. 6). On December 5, 2000, the
26 Ninth Circuit Court of Appeals denied Petitioner's request for a
27 certificate of appealability. (Id.; Docket Entry No. 12).

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

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

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

8 (B) (i) the factual predicate for the claim could
9 not have been discovered previously through the exercise
of due diligence; and

10 (ii) the facts underlying the claim, if proven and
11 viewed in light of the evidence as a whole, would be
sufficient to establish by clear and convincing evidence
12 that, but for constitutional error, no reasonable fact
finder would have found the applicant guilty of the
13 underlying offense.

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

17 (B) A motion in the court of appeals for an order
authorizing the district court to consider a second or
18 successive application shall be determined by a three-
judge panel of the court of appeals.

19 (C) The court of appeals may authorize the filing
of a second or successive application only if it
20 determines that the application makes a prima facie
showing that the application satisfies the requirements
21 of this subsection.

22 (D) The court of appeals shall grant or deny the
authorization to file a second or successive application
23 not later than 30 days after the filing of the motion.

24 (E) The grant or denial of an authorization by a
court of appeals to file a second or successive
25 application shall not be appealable and shall not be the
subject of a Petition for Rehearing or for a Writ of
26 Certiorari.

27 (4) A district court shall dismiss any claim
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1 presented in a second or successive application that the
2 court of appeals has authorized to be filed unless the
3 applicant shows that the claim satisfies the
requirements of this section. 28 U.S.C. § 2244.

4 28 U.S.C. § 2244(b) (3) "creates a 'gatekeeping' mechanism for
5 the consideration of second or successive applications in district
6 court. The prospective applicant must file in the court of
7 appeals a motion for leave to file a second or successive habeas
8 application in the district court. § 2244(b) (3) (A)." Felker v.
9 Turpin, 518 U.S. 651, 657 (1996).

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11 The instant Petition, filed on May 23, 2016, as well as the
12 prior habeas actions which also challenge Petitioner's custody
13 pursuant to the same 1995 judgment entered by the Los Angeles
14 County Superior Court, is a second or successive habeas petition
15 for purposes of 28 U.S.C. § 2244. Therefore, Petitioner was
16 required to obtain authorization from the Court of Appeals before
17 filing the present Petition. See 28 U.S.C. §2244(b) (3) (A). No
18 such authorization has been obtained in this case.

19
20 Moreover, the claim(s) asserted in the instant Petition do
21 not appear to fall within the exceptions to the bar on second or
22 successive petitions because the asserted claims are not based on
23 newly discovered facts or a "a new rule of constitutional law,
24 made retroactive to cases on collateral review by the Supreme
25 Court, that was previously unavailable." Tyler v. Cain, 533 U.S.
26 656, 662 (2001). However, this determination must be made by the
27 United States Court of Appeals upon a petitioner's motion for an
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1 order authorizing the district court to consider his second or
2 successive petition. 28 U.S.C. § 2244(b); see also Burton v.
3 Stewart, 549 U.S. 147, 157 (2007) (where the petitioner did not
4 receive authorization from the Court of Appeals before filing
5 second or successive petition, “the District Court was without
6 jurisdiction to entertain [the petition]”); Barapind v. Reno, 225
7 F.3d 1100, 1111 (9th Cir. 2000) (“[T]he prior-appellate-review
8 mechanism set forth in § 2244(b) requires the permission of the
9 court of appeals before ‘a second or successive habeas application
10 under § 2254’ may be commenced.”). Because Petitioner has not
11 obtained authorization from the Ninth Circuit Court of Appeals,
12 this Court cannot entertain the present Petition. See Burton v.
13 Stewart, supra.

14
15 To the extent that Petitioner is attempting to allege a claim
16 of actual innocence in an attempt to bypass the successive
17 petition hurdle, see McQuiggin v. Perkins, 133 S.Ct. 1924, 1928
18 (2013) (“We hold that actual innocence, if proved, serves as a
19 gateway through which a petitioner may pass whether the impediment
20 is a procedural bar, as it was in *Schlup* and *House*, or, as in this
21 case, expiration of the statute of limitations), Petitioner has
22 failed to show the actual innocence exception applies in his case.
23 Under the actual innocence exception to the statute of
24 limitations, a petitioner must show that “‘in light of the new
25 evidence, no juror, acting reasonably, would have voted to find
26 him guilty beyond a reasonable doubt.’” McQuiggin v. Perkins,
27 supra (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)); see

1 House v. Bell, 547 U.S. 518, 538 (2006) (“A petitioner’s burden at
2 the gateway stage is to demonstrate that more likely than not, in
3 light of the new evidence, no reasonable juror would find him
4 guilty beyond a reasonable doubt-or, to remove the double
5 negative, that more likely than not any reasonable juror would
6 have reasonable doubt.”).

7
8 Here, Petitioner’s asserted claim of actual innocence is
9 merely a claim of evidentiary error (overly suggestive
10 identifications) and ineffective assistance of appellate counsel.
11 See Bousley v. United States, 523 U.S. 614, 623 (1998) (“‘Actual
12 innocence’ means factual innocence, not mere legal
13 insufficiency.”); Morales v. Ornoski, 439 F.3d 529, 533-34 (9th
14 Cir. 2006). Moreover, Petitioner has not even purported to make
15 a showing of actual innocence, supported by new reliable evidence.
16 See Schlup v. Delo, supra, 513 U.S. at 324 (“To be credible, [a
17 claim of actual innocence] requires petitioner to support his
18 allegations of constitutional error with new reliable evidence--
19 whether it be exculpatory scientific evidence, trustworthy
20 eyewitness accounts, or critical physical evidence--that was not
21 presented at trial.”). Petitioner simply has not presented an
22 “exceptional case[] involving a compelling claim of actual
23 innocence.” House v. Bell, supra, 547 U.S. at 521; see Schlup v.
24 Delo, supra (“[E]xperience has taught us that a substantial claim
25 that constitutional error has caused the conviction of an innocent
26 person is extremely rare.”); McQuiggin v. Perkins, supra (“We
27 caution, however, that tenable actual-innocence gateway pleas are
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1 rare").

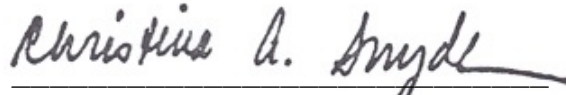
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3 Consequently, it does not appear that the actual innocence
4 exception to filing a successive petition would apply, although
5 this is a determination which must be made by the Ninth Circuit
6 Court of Appeals.

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8 **ORDER**

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10 Accordingly, IT IS ORDERED that the Petition be dismissed
11 without prejudice.

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13 LET JUDGMENT BE ENTERED ACCORDINGLY.

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15 DATED: June 2, 2016

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18 CHRISTINA A. SNYDER
19 UNITED STATES DISTRICT JUDGE
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