

## I. BACKGROUND

1 Memorandum of Points and Authorities ("Memorandum") and by  
2 Petitioner's Affidavit. (Docket Entry Nos. 2-3). Petitioner  
3 challenges his 2010 convictions for mayhem and assault by means  
4 likely to produce great bodily injury, as well as his 46-years-  
5 to-life sentence, in Los Angeles County Superior Court (Case No.  
6 BA339752).<sup>1</sup> The Petition alleges the following ground for federal  
7 habeas relief: (1) Petitioner received ineffective assistance of  
8 counsel based on his trial counsel's failure to investigate and  
9 present mitigating evidence at trial and at sentencing, make  
10 timely objections to false testimony and false evidence, and  
11 allow Petitioner to testify; (2) Petitioner received ineffective  
12 assistance of counsel based on his appellate counsel's deviation  
13 from claims; (3) The prosecutor failed to disclose exculpatory  
14 evidence, thereby violating Petitioner's rights to present a  
15 meaningful and complete defense and to a fair and impartial  
16 trial; (4) Two prosecution witnesses gave false testimony, in  
17 violation of Petitioner's right to due process; (5) "There was a  
18 systematic exclusion of African American jurors in the jury  
19 selection process."; (6) Petitioner is actually innocent; and (7)  
20 Petitioner's sentence under California's Three Strikes Law  
21 constituted cruel and unusual punishment. (Petition at 5;  
22 Memorandum at 1-7; Petitioner's Affidavit at 1-6.)<sup>2</sup>

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24 <sup>1</sup> The Court takes judicial notice of the pleadings in  
25 David Hamilton v. William Knipp, Warden, Case No. CV 14-08537-DSF  
(RZ).

26 <sup>2</sup> To the extent that Petitioner is attempting to seek  
27 relief from Judgment in Case No. CV 14-08537-DSF (RZ) under  
28 Fed.R.Civ.P 60(b)(6), Petitioner has failed to show extraordinary  
circumstances justifying the reopening of a final judgment. See  
Gonzalez v. Crosby, 545 U.S. 524, 536 (2005); LaFarge Conseils et

1 On November 4, 2014, Petitioner filed a Petition for Writ of  
2 Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C.  
3 § 2254, in which he challenged the same 2010 convictions and  
4 sentence ("prior habeas action"). See David Hamilton v. William  
5 Knipp, Case No. CV 14-08537-DSF (DZ) (Docket Entry No. 1). On  
6 June 15, 2015, the Court issued an Order and Judgment denying  
7 that habeas petition and dismissing the action with prejudice  
8 (based on its untimeliness), in accordance with the findings,  
9 conclusions and recommendations of the assigned Magistrate Judge.  
10 (Id.; Docket Entry Nos. 28-29.) On the same date, the Court  
11 denied Petitioner a certificate of appealability. (Id.; Docket  
12 Entry No. 30.) On February 16, 2016, the Ninth Circuit Court of  
13 Appeals denied Petitioner's request for a certificate of  
14 appealability. (Id.; Docket Entry No. 37.)

## 16 II. DISCUSSION

18 The Antiterrorism and Effective Death Penalty Act of 1996  
19 ("AEDPA"), enacted on April 24, 1996, provides in pertinent part:

21 (a) No circuit or district judge shall be  
22 required to entertain an application for a writ of  
23 habeas corpus to inquire into the detention of a

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25 Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1338  
26 (9th Cir. 1986) (citations omitted); see also Lehman v. United  
27 States, 154 F.3d 1010, 1017 (9th Cir. 1998) ("To receive Rule  
28 60(b)(6) relief, a moving party must show both injury and that  
circumstances beyond [his or her] control prevented timely action  
to protect [his or her] interests.").

1 person pursuant to a judgment of a court of the  
2 United States if it appears that the legality of such  
3 detention has been determined by a judge or court of  
4 the United States on a prior application for a writ  
5 of habeas corpus, except as provided in §2255.

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

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

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

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

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

27 (3)(A) Before a second or successive application  
28 permitted by this section is filed in the district

1 court, the applicant shall move in the appropriate  
2 court of appeals for an order authorizing the  
3 district court to consider the application.

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

8 (C) The court of appeals may authorize the  
9 filing of a second or successive application only if  
10 it determines that the application makes a prima  
11 facie showing that the application satisfies the  
12 requirements of this subsection.

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

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

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

27  
28 28 U.S.C. § 2244(b) (3) "creates a 'gatekeeping' mechanism for

1 the consideration of second or successive applications in district  
2 court. The prospective applicant must file in the court of  
3 appeals a motion for leave to file a second or successive habeas  
4 application in the district court. § 2244(b)(3)(A).” Felker v.  
5 Turpin, 518 U.S. 651, 657(1996).

6  
7 The instant Petition and the prior habeas action both  
8 challenge Petitioner’s custody pursuant to the same 2010 judgment  
9 entered by the Los Angeles County Superior Court. Accordingly,  
10 the instant Petition, filed on November 8, 2017, well after the  
11 effective date of the AEDPA, is a second or successive habeas  
12 petition for purposes of 28 U.S.C. § 2244. Therefore, Petitioner  
13 was required to obtain authorization from the Court of Appeals  
14 before filing the present Petition. See 28 U.S.C. §2244(b)(3)(A).  
15 No such authorization has been obtained.

16  
17 Moreover, the claims asserted in the instant Petition do not  
18 appear to fall within the exceptions to the bar on second or  
19 successive petitions because the asserted claims are not based on  
20 newly discovered facts or a “a new rule of constitutional law,  
21 made retroactive to cases on collateral review by the Supreme  
22 Court, that was previously unavailable.” Tyler v. Cain, 533 U.S.  
23 656, 662 (2001). However, this determination must be made by the  
24 United States Court of Appeals on a petitioner’s motion for an  
25 order authorizing the district court to consider his second or  
26 successive petition. 28 U.S.C. § 2244(b); see Burton v. Stewart,  
27 549 U.S. 147, 157 (2007) (where the petitioner did not receive  
28 authorization from the Court of Appeals before filing second or

1 successive petition, "the District Court was without jurisdiction  
2 to entertain [the petition]"); Barapind v. Reno, 225 F.3d 1100,  
3 1111 (9th Cir. 2000) ("[T]he prior-appellate-review mechanism set  
4 forth in § 2244(b) requires the permission of the court of appeals  
5 before 'a second or successive habeas application under § 2254'  
6 may be commenced."). Because Petitioner has not obtained  
7 authorization from the Ninth Circuit, this Court cannot entertain  
8 the present Petition. See Burton v. Stewart, supra.

9  
10 To the extent that Petitioner is attempting to allege a claim  
11 of actual innocence in an attempt to bypass the successive  
12 petition hurdle, see McQuiggin v. Perkins, 133 S.Ct. 1924, 1928  
13 (2013) ("We hold that actual innocence, if proved, serves as a  
14 gateway through which a petitioner may pass whether the impediment  
15 is a procedural bar, as it was in *Schlup* and *House*, or, as in this  
16 case, expiration of the statute of limitations), Petitioner has  
17 failed to show the actual innocence exception applies in his case.  
18 Under the actual innocence exception to the statute of  
19 limitations, a petitioner must show that "'in light of the new  
20 evidence, no juror, acting reasonably, would have voted to find  
21 him guilty beyond a reasonable doubt.'" Id. (quoting Schlup v.  
22 DeLo, 513 U.S. 298, 329 (1995)); see House v. Bell, 547 U.S. 518,  
23 538 (2006) ("A petitioner's burden at the gateway stage is to  
24 demonstrate that more likely than not, in light of the new  
25 evidence, no reasonable juror would find him guilty beyond a  
26 reasonable doubt-or, to remove the double negative, that more  
27 likely than not any reasonable juror would have reasonable  
28 doubt.").

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

19  
20 Consequently, it does not appear that the actual innocence  
21 exception to filing a successive petition would apply, although  
22 this is a determination that must be made by the Ninth Circuit  
23 Court of Appeals.

### 24 25 26 III. ORDER

27  
28 IT IS ORDERED that the Petition be dismissed without



1 prejudice.

2  
3 11/27/17

4 DATED: \_\_\_\_\_



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6 DALE S. FISCHER  
7 UNITED STATES DISTRICT JUDGE  
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