

1 **II. PROCEDURAL HISTORY¹**

2 **A. The State Case**

3 On January 22, 2009, a Riverside County Superior Court jury found
4 petitioner guilty of attempted murder, assault with a firearm and possession of a
5 firearm by a felon. The jury also found true allegations that in the course of
6 committing one or more of the foregoing crimes petitioner personally and
7 intentionally used a handgun and/or discharged a firearm causing great bodily
8 injury to another/the victim.²

9 On March 6, 2009, the trial court found that petitioner had suffered several
10 prior convictions and sentenced petitioner to a total of 42 years to life in state
11 prison. On June 28, 2010, the California Court of Appeal affirmed the judgment,
12 but remanded the case with directions to correct a sentencing error. On remand,
13 the trial court re-sentenced petitioner to a total of 41 years to life in state prison.
14 Petitioner did not seek further direct review.

15 Petitioner thereafter sought, and was denied habeas relief in Riverside
16 County Superior Court, the California Court of Appeal and the California Supreme
17 Court.

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21 ¹The facts and procedural history set forth in this section are derived from the Current
22 Federal Petition and dockets/court records in the following cases in the Central District of
23 California and the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”), of
24 which this Court takes judicial notice: (1) Central District of California Case No. EDCV 12-818
25 MMM(JC) (“First Federal Petition” or “First Federal Action”); (2) Ninth Circuit Case No. 13-
26 56364 (“First Ninth Circuit Action”); (3) Ninth Circuit Case No. 15-56206 (“Second Ninth
27 Circuit Action”); and (4) Ninth Circuit Case No. 16-72388 (“Third Ninth Circuit Action”). See
28 Fed. R. Evid. 201; Harris v. County of Orange, 682 F.3d 1126, 1131-32 (9th Cir. 2012) (court
may take judicial notice of undisputed matters of public record including documents on file in
federal or state courts).

²The jury did not find true the allegation that the attempted murder was committed
willfully, deliberately and with premeditation.

1 **B. Prior Federal Actions**

2 On May 21, 2012, petitioner filed the First Federal Petition in the First
3 Federal Action in which petitioner challenged the judgment in the State Case on
4 the following grounds: (1) the evidence presented at trial was insufficient to
5 support his convictions; and (2) petitioner’s appellate counsel rendered ineffective
6 assistance by not raising an insufficiency of the evidence claim on direct review.

7 On June 14, 2013, the previously assigned District Judge accepted the United
8 States Magistrate Judge’s Report and Recommendation recommending denial of
9 the First Federal Petition on the merits and dismissal with prejudice. On June 19,
10 2013, judgment was enter denying the First Federal Petition and dismissing the
11 First Federal Action with prejudice. On August 15, 2014, in the First Ninth Circuit
12 Action, the Ninth Circuit denied petitioner’s request for a certificate of
13 appealability.

14 On December 3, 2014, petitioner filed a Motion for Relief from Final
15 Judgment in the First Federal Action. On May 29, 2015, the previously assigned
16 District Judge denied such motion without prejudice for lack of jurisdiction and
17 referred it to the Ninth Circuit for consideration as an application to file a second
18 or successive petition pursuant to Ninth Circuit Rule 22-3(a).³ On October 29,
19 2015, in the Second Ninth Circuit Action, the Ninth Circuit denied petitioner’s
20 request for a certificate of appealability.

21 On January 23, 2017, in the Third Ninth Circuit Action, the Ninth Circuit
22 denied petitioner’s application to file a second or successive habeas corpus
23 petition, noting that such application only raised claims that had previously been
24 presented in the First Federal Petition.

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26 ³Ninth Circuit Rule 22-3(a) provides in pertinent part: “Any petitioner seeking
27 authorization to file a second or successive 2254 petition . . . in the district court must file an
28 application in the Court of Appeals demonstrating entitlement to such leave under 28 U.S.C.
§ 2254 If a second or successive petition . . . is mistakenly submitted to the district court,
the district court shall refer it to the [C]ourt of [A]ppeals.”

1 **C. Current Federal Petition**

2 As noted above, on April 18, 2017, petitioner filed the Current Federal
3 Petition. The Current Federal Petition again challenges the judgment in the State
4 Case on the following grounds: (1) the evidence presented at trial was insufficient
5 to support his convictions; and (2) petitioner’s appellate counsel rendered
6 ineffective assistance by not raising an insufficiency of the evidence claim on direct
7 review. The record does not reflect that petitioner has obtained authorization from
8 the Ninth Circuit to file the Current Federal Petition in District Court and indeed,
9 affirmatively reflects that he has already been denied such leave.⁴

10 **III. DISCUSSION**

11 Before a habeas petitioner may file a second or successive petition in a
12 district court, he must apply to the appropriate court of appeals for an order
13 authorizing the district court to consider the application. Burton v. Stewart, 549
14 U.S. 147, 152-53 (2007) (citing 28 U.S.C. § 2244(b)(3)(A)). This provision
15 “creates a ‘gatekeeping’ mechanism for the consideration of second or successive
16 applications in district court.” Felker v. Turpin, 518 U.S. 651, 657 (1996); see also
17 Reyes v. Vaughn, 276 F. Supp. 2d 1027, 1028-30 (C.D. Cal. 2003) (discussing
18 applicable procedures in Ninth Circuit). A district court lacks jurisdiction to
19 consider the merits of a second or successive habeas petition in the absence of
20 proper authorization from a court of appeals. Cooper v. Calderon, 274 F.3d 1270,
21 1274 (9th Cir. 2001) (per curiam) (citing United States v. Allen, 157 F.3d 661, 664
22 (9th Cir. 1998)), cert. denied, 538 U.S. 984 (2003).

23 The court of appeals may authorize the filing of a second or successive
24 petition only if it determines that the petition makes a prima facie showing that at
25 least one claim within the petition satisfies the requirements of 28 U.S.C.

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28 ⁴A 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 Section 2244(b), *i.e.*, that a claim which was not presented in a prior application
2 (1) relies on a new rule of constitutional law, made retroactive to cases on collateral
3 review by the Supreme Court; or (2) the factual predicate for the claim could not
4 have been discovered previously through the exercise of due diligence and the facts
5 underlying the claim would be sufficient to establish that, but for constitutional
6 errors, no reasonable factfinder would have found the applicant guilty of the
7 underlying offense. Nevius v. McDaniel, 104 F.3d 1120, 1120-21 (9th Cir. 1997);
8 Nevius v. McDaniel, 218 F.3d 940, 945 (9th Cir. 2000).

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

23 The First Federal Petition in the First Federal Action was denied on its merits
24 – not for a technical or procedural reason. Accordingly, the Current Federal
25 Petition is successive. Since petitioner filed the Current Federal Petition without
26 authorization from the Ninth Circuit, this Court lacks jurisdiction to consider it.

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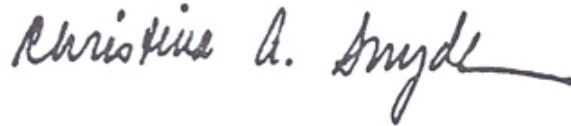
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1 **IV. ORDER**

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

4 IT IS SO ORDERED.

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6 DATED: April 25, 2017



8 HONORABLE CHRISTINA A. SNYDER
9 UNITED STATES DISTRICT JUDGE

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