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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

MARVIN GUERRA,	)	Case No. CV 12-7508-PSG (MLG)
	)	
Petitioner,	)	MEMORANDUM OPINION AND ORDER
	)	DISMISSING PETITION WITHOUT
v.	)	PREJUDICE AND DENYING CERTIFICATE
	)	OF APPEALABILITY
R. DIAZ, Warden,	)	
	)	
Respondent.	)	
_____	)	

**I. Factual and Procedural Background**

Petitioner is a state prisoner. He filed this petition for writ of habeas corpus on August 31, 2012. Because this is Petitioner's second petition challenging the same underlying state court judgment, the petition must be dismissed as successive under 28 U.S.C. § 2244(b)(3)(A).

The petition shows that Petitioner was convicted, following a jury trial in the Los Angeles County Superior Court, of attempted murder, aggravated mayhem and possession of a firearm, in violation of Cal. Penal Code §§ 664/187, 205, and 12022.53. In May 2004, Guerra was sentenced to life in prison with a minimum parole eligibility date of 15 years, plus 25 years to life. See *People v. Guerra*, 2005 WL 2403447

1 (Cal. App. 2005).

2       Petitioner appealed his conviction to the California Court of  
3 Appeal. On September 30, 2005, the court affirmed the judgment.  
4 Petitioner's application for review was denied by the California  
5 Supreme Court on December 21, 2005.<sup>1</sup> Eighteen months later, on August  
6 6, 2007, Petitioner filed a petition for writ of habeas corpus in this  
7 court. On November 1, 2007, District Judge Phillip S. Gutierrez  
8 dismissed the petition with prejudice because it was untimely filed.  
9 *Guerra v. Clark*, Case No. CV 07-6060-PSG (MLG). Petitioner did not  
10 appeal from that judgment.

11       No further action was taken until April 27, 2012, when Petitioner  
12 filed a habeas corpus petition in the California Supreme Court. *In re*  
13 *Guerra*, Case No. S202123. That petition was denied on July 11, 2012.  
14 This petition followed.

15       In the current petition, Petitioner raises a variety of new claims  
16 of error relating to the ineffective assistance of trial and appellate  
17 counsel and asserts that he is actually innocent of the offenses for  
18 which he was convicted. Because it is clear that Petitioner is  
19 challenging the constitutionality of the very same judgment addressed  
20 in Case No. CV 07-6060-PSG (MLG), this petition must be dismissed as  
21 successive within the meaning of 28 U.S.C. § 2244(b)(3)(A).

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27       <sup>1</sup> These dates have been confirmed by accessing the California  
28 Appellate Courts Case Information website.  
<http://appellatecases.courtinfo.ca.gov/search>.

1 **II. Discussion.**

2 Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in  
3 the United States District Court, a district court may summarily  
4 dismiss a habeas corpus petition, before the respondent files an  
5 answer, "[if it plainly appears from the face of the petition ... that  
6 the petitioner is not entitled to relief." The notes to Rule 4 state:  
7 "a dismissal may be called for on procedural grounds, which may avoid  
8 burdening the respondent with the necessity of filing an answer on the  
9 substantive merits of the petition." See *Boyd v. Thompson*, 147 F.3d  
10 1124, 1127-28 (9th Cir. 1998). It is beyond question that this Court  
11 lacks jurisdiction to review this petition without authorization from  
12 the court of appeals. Accordingly, summary dismissal of this petition  
13 is warranted.<sup>2</sup>

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15 <sup>2</sup> Petitioner has consented to the exercise of consent jurisdiction  
16 by the United States Magistrate Judge. "Upon the consent of the  
17 parties," a magistrate judge "may conduct any or all proceedings in a  
18 jury or nonjury civil matter and order the entry of judgment in the  
19 case." 28 U.S.C. § 636(c)(1). Here, Petitioner is the only "party" to  
20 the instant proceeding and has consented to the jurisdiction of the  
21 undersigned United States Magistrate Judge. Respondent has not yet been  
22 served with the Petition and therefore is not a party to this  
23 proceeding. See, e.g., *Travelers Cas. & Sur. Co. of Am. v. Brenneke*,  
24 551 F.3d 1132, 1135 (9th Cir. 2009) ("A federal court is without  
25 personal jurisdiction over a defendant unless the defendant has been  
26 served in accordance with Fed. R. Civ. P. 4." (internal quotation marks  
27 omitted)). Thus, all parties have consented pursuant to 28 U.S.C. §  
28 636(c)(1). See, e.g., *Neals v. Norwood*, 59 F.3d 530, 532 (5th Cir. 1995)  
(holding that magistrate judge had jurisdiction to dismiss prison  
inmate's action under 42 U.S.C. § 1983 as frivolous without consent of  
defendants because defendants had not been served yet and therefore  
were not parties); *United States v. Real Property*, 135 F.3d 1312, 1317  
(9th Cir. 1998) (holding that magistrate judge had jurisdiction to  
enter default judgment in an in rem forfeiture action even though  
property owner had not consented to it because 28 U.S.C. § 636(c)(1)  
only requires the consent of the "parties" and the property owner,  
having failed to comply with the applicable filing requirements, was  
not a "party"); see also *Patrick Collins, Inc. v. Doe*, 2011 U.S. Dist.  
LEXIS 125671, at \*4 n.1 (N.D. Cal. Oct. 31, 2011) ("Here, Plaintiff has  
consented to magistrate jurisdiction and the Doe Defendants have not  
yet been served. Therefore, the Court finds that it has jurisdiction  
under 28 U.S.C. § 636(c) to decide the issues raised in the instant

1 The Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L.  
2 104-132, 110 Stat. 1214) ("AEDPA") requires that "[before a second or  
3 successive application [for writ of habeas corpus] permitted by this  
4 section is filed in the district court, the applicant shall move in the  
5 appropriate court of appeals for an order authorizing the district  
6 court to consider the application." 28 U.S.C. § 2244(b)(3)(A). Section  
7 2244(b)(3)(A) explicitly mandates that a second and/or successive  
8 petition, like the one in this case, requires Ninth Circuit approval  
9 before it can be considered by the district court. *Burton v. Stewart*,  
10 549 U.S. 147, 153 (2007). This Court must dismiss any second or  
11 successive petition challenging the merits of a judgment unless the  
12 court of appeals has given Petitioner leave to file the petition  
13 because a district court lacks subject-matter jurisdiction over a  
14 second or successive petition. *Burton*, 549 U.S. at 157. The Ninth  
15 Circuit has held the dismissal of a § 2254 habeas corpus petition as  
16 untimely constitutes a disposition on the merits, therefore, a further  
17 petition challenging the same conviction constitutes a "second or  
18 successive" petition for purposes of § 2244(b). *McNabb v. Yates*, 576

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20 motion(s)."); *Third World Media, LLC v. Doe*, 2011 WL 4344160, at \*3  
21 (N.D. Cal. Sept. 15, 2011) ("The court does not require the consent of  
22 the defendants to dismiss an action when the defendants have not been  
23 served and therefore are not parties under 28 U.S.C. § 636(c).");  
24 *Kukiela v. LMA Prof'l Recovery Group*, 2011 U.S. Dist. LEXIS 85417, at  
25 \*1 n.1 (D. Ariz. Aug. 1, 2011) ("Plaintiff consented to proceed before  
26 a United States Magistrate Judge for all proceedings in this case,  
27 including entry of final judgment, pursuant to 28 U.S.C. §636(c)(1).  
28 (Doc. 7.) Because Defendant did not appear and establish its standing  
as a party in this action, the Magistrate Judge has jurisdiction to  
enter the requested default judgment."); *Quigley v. Geithner*, 2010 WL  
3613901, at \*1 (D. Idaho Sept. 8, 2010) ("Plaintiff, the only party  
appearing in this case, has consented to the jurisdiction of a United  
States Magistrate Judge to enter final orders in this case."); *Ornelas  
v. De Frantz*, 2000 WL 973684, at \*2 n.2 (N.D. Cal. June 29, 2000) ("The  
court does not require the consent of defendants in order to dismiss  
this action because defendants have not been served, and, as a result,  
are not parties under the meaning of 28 U.S.C. § 636(c).").

1 F.3d 1028, 1029 (9th Cir. 2009).

2 This second petition raises entirely new claims for relief. A  
3 claim in a second or successive habeas petition which was not  
4 previously presented may be considered if the petitioner shows that 1)  
5 the claim rests on a new, retroactive, constitutional right, or 2) the  
6 factual basis of the claim was not previously discoverable through due  
7 diligence, and these new facts establish by clear and convincing  
8 evidence that but for the constitutional error, no reasonable  
9 fact-finder would have reached the same factual conclusion. 28 U.S.C.  
10 § 2244(b)(2)(A)-(B). However, it is not the district court that decides  
11 whether a second or successive petition meets these requirements. A  
12 petitioner is still required to seek authorization from the court of  
13 appeals in order to have the district court consider the petition. 28  
14 U.S.C. § 2244(b)(3)(A), *see also Reyes v. Vaughn*, 276 F.Supp.2d 1027,  
15 1030 (C.D. Cal. 2003) ("[T]o the extent that petitioner would like to  
16 show that he falls within one of the exceptions to dismissal of  
17 successive habeas petitions, 28 U.S.C. § 2244(b)(2)(B), he must first  
18 present any such claim to the Court of Appeals rather than to this  
19 Court.").

20 This petition was filed without leave of the Ninth Circuit. Until  
21 the Ninth Circuit authorizes the filing of this petition, this Court  
22 lacks jurisdiction to consider the merits. *See Burton*, 549 U.S. at 157;  
23 *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001). Accordingly,  
24 the petition is DISMISSED WITHOUT PREJUDICE.

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1 **CERTIFICATE OF APPEALABILITY**

2 A certificate of appealability will not issue. Reasonable jurists  
3 would not find the dismissal of the petition as successive debatable or  
4 wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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6 Dated: September 5, 2012

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11 Marc L. Goldman  
12 United States Magistrate Judge  
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