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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 HIRAM SUMMERS,) Case No. CV 17-5487 DOC(JC)
12 Petitioner,)
13 v.) ORDER DISMISSING PETITION
14 ERIC ARNOLD,) FOR WRIT OF HABEAS CORPUS
15) AND ACTION WITHOUT
16 Respondent.) PREJUDICE

17 **I. SUMMARY**

18 On July 25, 2017, petitioner Hiram Summers (“petitioner”), a California
19 prisoner who is proceeding *pro se*, formally filed a Petition for Writ of Habeas
20 Corpus (“Current Federal Petition”) and an Election Regarding Consent to
21 Proceed Before a United States Magistrate Judge which reflects that he voluntarily
22 consents to have a United States Magistrate Judge conduct all further proceedings
23 in this case, decide all dispositive and non-dispositive matters, and order the entry
24 of final judgment.¹ The Current Federal Petition challenges a 2004 state judgment

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26 ¹“Upon the consent of the parties,” a magistrate judge “may conduct any or all
27 proceedings in a jury or nonjury civil matter and order the entry of judgment in the case.”
28 28 U.S.C. § 636(c)(1). Here, petitioner is the only “party” to the proceeding and has consented to
the jurisdiction of the undersigned U.S. Magistrate Judge. Respondent has not yet been served
and therefore is not yet a party to this action. See, e.g., Travelers Cas. & Sur. Co. of Am. v.
(continued...)

1 in Los Angeles County Superior Court Case No. BA260968 (“State Case” or
2 “State Conviction”).

3 Based on the record (including facts as to which this Court takes judicial
4 notice as detailed below) and the applicable law, the Current Federal Petition and
5 this action are dismissed without prejudice for lack of jurisdiction because
6 petitioner did not obtain, and in fact has been denied the requisite authorization
7 from the Court of Appeals to file a successive petition.

8 **II. PROCEDURAL HISTORY²**

9 **A. The State Case**

10 **1. Conviction and Sentence**

11 On July 8, 2004, in the State Case, a Los Angeles County Superior Court
12 (“LASC”) jury convicted petitioner of first degree murder and found that in the

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14 ¹(...continued)
15 Brenneke, 551 F.3d 1132, 1135 (9th Cir. 2009) (“A federal court is without personal jurisdiction
16 over a defendant unless the defendant has been served in accordance with Fed. R. Civ. P. 4.”
17 (internal quotation marks and citation omitted). Thus, all parties have consented pursuant to
18 § 636(c)(1). See Wilhelm v. Rotman, 680 F.3d 1113, 1119–21 (9th Cir. 2012) (holding that
19 magistrate judge had jurisdiction to sua sponte dismiss prisoner’s lawsuit under 42 U.S.C.
20 § 1983 for failure to state claim because prisoner consented and was only party to action); Carter
21 v. Valenzuela, 2012 WL 2710876, at *1 n.3 (C.D. Cal. July 9, 2012) (after Wilhelm, finding that
22 magistrate judge had authority to deny successive habeas petition when petitioner had consented
23 and respondent had not yet been served with petition).

24 ²The procedural history set forth in this section is derived from the Current Federal
25 Petition and supporting documents, public dockets and court records in the referenced cases of
26 the California Court of Appeal, Second Appellate District and the California Supreme Court
27 (accessible via <http://appellatecases.courtinfo.ca.gov>) of which this Court takes judicial notice,
28 and the public docket and court records in the following cases in the Central District of
California (“CDCA”) and the United States Court of Appeals for the Ninth Circuit (“Ninth
Circuit”) of which this Court takes judicial notice: (1) Hiram Summers v. A. Malfi, CDCA Case
No. CV 07-1027 DOC(JC) (“First Federal Action”); (2) Hiram E. Summers v. Arnold Eric,
CDCA Case No. CV 16-5570 DOC(JC) (“Second Federal Action”); and (3) Hiram Summers v.
Eric Arnold, Ninth Circuit Case No. 16-72907 (“Ninth Circuit Action”). See 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).

1 commission of the offense, petitioner personally and intentionally discharged a
2 firearm, a rifle, which proximately caused great bodily injury and death to the
3 victim, Leavar Williams. On July 15, 2004, the trial court sentenced petitioner to
4 fifty years to life in state prison.

5 **2. Direct Appeal**

6 On November 28, 2005, the California Court of Appeal, Second Appellate
7 District, affirmed the judgment in a reasoned decision in Case No. B176847. On
8 February 8, 2006, the California Supreme Court denied review in Case No.
9 S140141.

10 **3. State Collateral Review**

11 Petitioner thereafter collaterally challenged the judgment in the State Case
12 via petitions for a writ of habeas corpus and petitions for a writ of error coram
13 nobis filed in the LASC and the California Court of Appeal, Second Appellate
14 District (Case Nos. B197057, B263684), and petitions for a writ of habeas corpus
15 filed in the California Supreme Court (Case Nos. S151061, S162080). The
16 California courts denied such petitions.

17 **B. First Federal Action**

18 On February 14, 2007, petitioner filed a Petition for Writ of Habeas Corpus
19 in the First Federal Action in which petitioner challenged the judgment in the State
20 Case. On January 11, 2008, petitioner filed a First Amended Petition for Writ of
21 Habeas Corpus in the First Federal Action (“Operative First Federal Petition”) in
22 which petitioner challenged the judgment in the State Case.³ On July 28, 2010, the
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24 ³Even though petitioner, in the Operative First Federal Petition, to some degree confused
25 the case numbers assigned at different levels of state review, it was apparent that he challenged
26 the judgment in the State Case therein. More specifically, in the location which called for the
27 case number of the conviction on which the Operative First Federal Petition was based, petitioner
28 referenced the case number for the California Court of Appeal case affirming the judgment in the
State Case on direct appeal (*i.e.*, Case No. B176847) instead of the LASC case number for the
State Case (*i.e.*, BA260968). Relatedly, in the locations of the Operative First Federal Petition
which called for the case numbers of the California Court of Appeal and California Supreme

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1 assigned District Judge adopted the United States Magistrate Judge’s Report and
2 Recommendation recommending denial of the Operative First Federal Petition on
3 the merits and dismissal with prejudice. On August 2, 2010, judgment was enter
4 dismissing the Operative First Federal Petition with prejudice. The District Judge
5 denied petitioner a certificate of appealability. Petitioner did not appeal.

6 **C. Second Federal Action and Ninth Circuit Action**

7 On July 26, 2016, petitioner filed a Petition for Writ of Habeas Corpus in
8 the Second Federal Action (“Second Federal Petition”). As the Second Federal
9 Petition contained inconsistent information as to the state judgment it was
10 intended to challenge (*e.g.*, in one location it purported to challenge a judgment in
11 LASC Case No. BA260964, but in another location it asked the Court to vacate/set
12 aside the judgment in LASC Case No. BA260968 (*i.e.*, the State Case), the Court,
13 on July 27, 2016, issued an Order Directing Petitioner to Clarify Judgment
14 Challenged in [the Second Federal Petition]. On August 5, 2016, petitioner filed a
15 document captioned “Motion Clarifying Challenge Conviction of Case No.
16 # BA260968,” effectively clarifying that the Second Federal Petition was intended
17 to challenge the judgment in the State Case – the same judgment challenged in the
18 First Federal Action (and in the Current Federal Petition).

19 On August 16, 2016, the assigned United States District Judge dismissed the
20 Second Federal Petition and the Second Federal Action without prejudice for lack
21 of jurisdiction, denied a certificate of appealability, and referred the Second
22 Federal Petition to the Ninth Circuit for consideration as an application to file a

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27 ³(...continued)

28 Court cases affirming the judgment in the State Case, petitioner referenced the LASC case
number for the State Case (*i.e.*, BA260968).

1 second or successive petition.⁴ Judgment was entered accordingly on the same
2 date. Petitioner did not appeal.

3 On May 30, 2017, the Ninth Circuit denied petitioner's application to file a
4 second or successive habeas corpus petition challenging the judgment in the State
5 Case in the Ninth Circuit Action.

6 **D. Current Federal Petition**

7 As noted above, on July 25, 2017, petitioner formally filed the Current
8 Federal Petition which again challenges the judgment in the State Case. The
9 record does not reflect that petitioner has obtained authorization from the Ninth
10 Circuit to file the Current Federal Petition in District Court and, as noted above,
11 instead reflects that the Ninth Circuit recently denied petitioner such
12 authorization.⁵

13 **III. DISCUSSION**

14 Before a habeas petitioner may file a second or successive petition in a
15 district court, he must apply to the appropriate court of appeals for an order
16 authorizing the district court to consider the application. Burton v. Stewart, 549
17 U.S. 147, 152-53 (2007) (citing 28 U.S.C. § 2244(b)(3)(A)). This provision
18 "creates a 'gatekeeping' mechanism for the consideration of second or successive
19 applications in district court." Felker v. Turpin, 518 U.S. 651, 657 (1996); see
20 also Reyes v. Vaughn, 276 F. Supp. 2d 1027, 1028-30 (C.D. Cal. 2003)
21 (discussing applicable procedures in Ninth Circuit). A district court lacks
22 jurisdiction to consider the merits of a second or successive habeas petition in the
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24 ⁴Ninth Circuit Rule 22-3(a) provides in pertinent part: "Any petitioner seeking
25 authorization to file a second or successive 2254 petition . . . in the district court must file an
26 application in the Court of Appeals demonstrating entitlement to such leave under 28 U.S.C.
27 § 2254 If a second or successive petition . . . is mistakenly submitted to the district court, the
28 district court shall refer it to the [C]ourt of [A]ppeals."

⁵A 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 absence of proper authorization from a court of appeals. Cooper v. Calderon, 274
2 F.3d 1270, 1274 (9th Cir. 2001) (per curiam) (citing United States v. Allen, 157
3 F.3d 661, 664 (9th Cir. 1998)), cert. denied, 538 U.S. 984 (2003).

4 The court of appeals may authorize the filing of a second or successive
5 petition only if it determines that the petition makes a prima facie showing that at
6 least one claim within the petition satisfies the requirements of 28 U.S.C.
7 Section 2244(b), *i.e.*, that a claim which was not presented in a prior application
8 (1) relies on a new rule of constitutional law, made retroactive to cases on
9 collateral review by the Supreme Court; or (2) the factual predicate for the claim
10 could not have been discovered previously through the exercise of due diligence
11 and the facts underlying the claim would be sufficient to establish that, but for
12 constitutional errors, no reasonable factfinder would have found the applicant
13 guilty of the underlying offense. Nevius v. McDaniel, 104 F.3d 1120, 1120-21
14 (9th Cir. 1997); Nevius v. McDaniel, 218 F.3d 940, 945 (9th Cir. 2000).

15 A second or subsequent habeas petition is not considered “successive” if the
16 initial habeas petition was dismissed for a technical or procedural reason, rather
17 than on the merits. See Slack v. McDaniel, 529 U.S. 473, 485-487 (2000) (second
18 habeas petition not “successive” if initial habeas petition dismissed for failure to
19 exhaust state remedies); Stewart v. Martinez-Villareal, 523 U.S. 637, 643-645
20 (1998) (second habeas petition not “successive” if claim raised in first habeas
21 petition dismissed as premature); but see McNabb v. Yates, 576 F.3d 1028, 1030
22 (9th Cir. 2009) (dismissal on statute of limitations grounds constitutes disposition
23 on the merits rendering subsequent petition “second or successive”); Henderson v.
24 Lampert, 396 F.3d 1049, 1053 (9th Cir.) (dismissal on procedural default grounds
25 constitutes disposition on the merits rendering subsequent petition “second or
26 successive”), cert. denied, 546 U.S. 884 (2005); Plaut v. Spendthrift Farm, Inc.,
27 514 U.S. 211, 228 (1995) (dismissal for failure to prosecute treated as judgment on
28 the merits) (citations omitted).

1 The Operative First Federal Petition in the First Federal Action was denied
2 on its merits – not for a technical or procedural reason. Accordingly, the Current
3 Federal Petition – like the Second Federal Petition – is successive. Since
4 petitioner filed the Current Federal Petition without authorization from the Ninth
5 Circuit, this Court lacks jurisdiction to consider it.

6 **IV. ORDER**

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

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10 DATED: July 25, 2017

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12 /s/

13 Honorable Jacqueline Chooljian
14 UNITED STATES MAGISTRATE JUDGE
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