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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

PARNEAL TYRONE HALL,
Petitioner,
v.
M.E. SPEARMAN, WARDEN,
Respondent.

NO. EDCV 14-1748-GHK (MAN)

ORDER: DISMISSING PETITION AS
SECOND OR SUCCESSIVE; DENYING
A CERTIFICATE OF APPEALABILITY;
AND REFERRING PETITION TO NINTH
CIRCUIT PURSUANT TO NINTH CIRCUIT
RULE 22-3(a)

On August 25, 2014, Petitioner filed a habeas petition, pursuant to 28 U.S.C. § 2254 ("Petition"). The Petition stems from Petitioner's San Bernardino County Superior Court conviction sustained in 1998, in Case No. FSB11745 (the "State Conviction").

Under the Rules Governing Section 2254 Cases in the United States District Courts, a habeas petition filed by a prisoner in state custody "must" be summarily dismissed "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4, 28 U.S.C. foll. § 2254. For the reasons set forth below, the Petition must be, and is, DISMISSED as second or successive, pursuant to 28 U.S.C. § 2244(b) and Rule 4.

1 **BACKGROUND**

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3 On September 11, 2006, Petitioner filed a Section 2254 habeas petition in this district in
4 Case No. CV 06-984-GHK (MAN) (the "First Action"),¹ which challenged the State Conviction. On
5 December 3, 2007, Judgment was entered dismissing the First Action, with prejudice, on the
6 ground that it was untimely. Petitioner appealed, and on August 19, 2009, the Ninth Circuit
7 denied a certificate of appealability (Case No. 08-55306). On April 2, 2010, the Ninth Circuit
8 denied Petitioner's request for rehearing. On June 3, 2009, the Ninth Circuit denied Petitioner's
9 request for rehearing and *en banc* review. Petitioner filed a petition for certiorari, and the
10 Supreme Court denied his petition on October 18, 2010 (Case No. 10-6147).

11
12 The instant Petition also challenges the State Conviction. He raises versions of the same
13 two claims previously raised in the First Action petition and three additional claims, based on: the
14 jury's failure to consider evidence of mitigating mental states; the ineffective assistance of trial
15 counsel during plea negotiations; and the ineffective assistance of counsel on appeal.

16
17 The Ninth Circuit's dockets show that Petitioner has not filed an application seeking leave
18 to raise his present claims through a second or successive Section 2254 petition.²

19
20 **DISCUSSION**

21
22 State habeas petitioners generally may file only one federal habeas petition challenging a
23 particular state conviction and/or sentence. *See, e.g.,* 28 U.S.C. § 2244(b)(1) (courts must
24

25
26 ¹ Pursuant to Rule 201 of the Federal Rules of Evidence, the Court takes judicial notice
27 of the records and files from Petitioner's prior actions in this district and the United States Court
of Appeals for the Ninth Circuit.

28 ² The only Ninth Circuit proceeding filed by Petitioner is his above-noted appeal in
connection with the First Action.

1 dismiss a claim presented in a second or successive petition when that claim was presented in a
2 prior petition) and § 2244(b)(2) (with several exceptions not applicable here, courts must dismiss
3 a claim presented in a second or successive petition when that claim was not presented in a prior
4 petition). "A habeas petition is second or successive . . . if it raises claims that were or could have
5 been adjudicated on the merits" in an earlier Section 2254 petition. McNabb v. Yates, 576 F.3d
6 1028, 1029 (9th Cir. 2009).

7
8 Even when Section 2244(b) provides a basis for pursuing a second or successive Section
9 2254 habeas petition, state habeas petitioners seeking relief in this district court must *first* obtain
10 authorization from the Ninth Circuit before filing any such second or successive petition. 28 U.S.C.
11 § 2244(b)(3). The Ninth Circuit "may authorize the filing of the second or successive [petition]
12 only if it presents a claim not previously raised that satisfies one of the two grounds articulated
13 in § 2242(b)(2)." Burton v. Stewart, 549 U.S. 147, 153, 127 S. Ct. 793, 796 (2007).

14
15 By the First Action, Petitioner sought Section 2254 relief based on the same State
16 Conviction at issue here. His earlier habeas petition was resolved adversely to him, because it
17 was untimely. The untimeliness of the First Action "presents a 'permanent and incurable' bar to
18 federal review," and the dismissal of the First Action "constitutes a disposition on the merits" for
19 purposes of Section 2244(b). McNabb, 576 F.3d at 1030 (citation omitted). The present Petition,
20 thus, is second or successive within the meaning of Section 2244(b). *See id.* (holding "that
21 dismissal of a section 2254 habeas petition for failure to comply with the statute of limitations
22 renders subsequent petitions second or successive for purposes of" Section 2244(b)); *in accord*
23 Murray v. Greiner, 394 F.3d 78, 79 (2d Cir. 2005); Altman v. Benik, 337 F.3d 764, 766 (7th Cir.
24 2003).

25
26 Petitioner asserts that some of the claims alleged in the instant Petition rest on newly
27 discovered evidence. The Court notes this allegedly "newly discovered evidence" appears to be
28 the same evidence that served as the basis for the claims alleged in the First Action petition,

1 which was filed almost eight years ago. In any event, whether or not the claims alleged in the
2 Petition may, as a *prima facie* matter, satisfy the requisites of 28 U.S.C. § 2244(b)(2) is a question
3 that must be presented to and resolved by the Ninth Circuit, not this District Court. Petitioner,
4 however, has not sought or obtained permission from the Ninth Circuit to bring a second or
5 successive Section 2254 petition raising the claim alleged in the instant Petition. This Court thus
6 lacks jurisdiction to consider the Petition. 28 U.S.C. § 2244(b); *see also* Burton, 549 U.S. at 157,
7 127 S. Ct. at 799 (district court lacks jurisdiction to consider the merits of a second or successive
8 petition absent prior authorization from the circuit court). Accordingly, IT IS ORDERED that: the
9 Petition is DISMISSED; and Judgment shall be entered dismissing this action without prejudice.³

10
11 ³ On August 25, 2014, Petitioner filed a signed and dated "Election Regarding Consent
12 To Proceed Before A United States Magistrate Judge." (See Docket No. 2.) Petitioner checked
13 the box stating, "Yes, I voluntarily consent to have a United States Magistrate Judge conduct all
14 further proceedings in this case, decide all dispositive and non-dispositive matters, and order the
15 entry of final judgment."

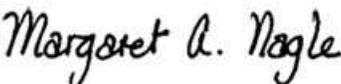
16 "Upon the consent of the parties," a magistrate judge "may conduct any or all
17 proceedings in a jury or nonjury civil matter and order the entry of judgment in the case." 28
18 U.S.C. § 636(c)(1). Petitioner is the only "party" to the proceeding to date, and he has consented
19 to the jurisdiction of the undersigned United States Magistrate Judge. Respondent has not yet
20 been served with the Petition and, therefore, is not yet a party to this action. *See, e.g.,* Travelers
21 Cas. & Sur. Co. of Am. v. Brenneke, 551 F.3d 1132, 1135 (9th Cir. 2009) ("A federal court is
22 without personal jurisdiction over a defendant unless the defendant has been served in
23 accordance with Fed. R. Civ. P. 4."). Indeed, given the lack of jurisdiction over the Petition due
24 to its second or successive nature, the Court *cannot* order that Respondent be served with, and
25 respond to, the Petition. When, as here, the petitioner has consented to magistrate judge
26 jurisdiction and the respondent has neither been served with process nor appeared in the action,
27 a magistrate judge may properly exercise consent jurisdiction over the case pursuant to Section
28 636(c)(1), including by ordering that dismissal of the action is warranted. Wilhelm v. Rotman, 680
F.3d 1113, 1119–21 (9th Cir. 2012) (holding that a magistrate judge had jurisdiction to dismiss
a prisoner's 42 U.S.C. § 1983 action, *sua sponte* and pursuant to 28 U.S.C. § 1915A screening,
when the prisoner checked the box on a consent form that read "The undersigned hereby
voluntarily consents to have a United States Magistrate Judge conduct all further proceedings in
this case," and no defendant had yet been served in the action). *See also* Neals v. Norwood, 59
F.3d 530, 532 (5th Cir. 1995) ("The record does not contain a consent from the defendants.
However, because they had not been served, they were not parties to this action at the time the
magistrate entered judgment. Therefore, lack of written consent from the defendants did not
deprive the magistrate judge of jurisdiction in this matter."); Holloway v. Price, CV 13-4134, 2013
WL 6145150, at *1 n.3 (C.D. Cal. Nov. 21, 2013) (finding that a magistrate judge may dismiss a
Section 2254 petition as second or successive when the petitioner had consented to have a
magistrate judge conduct all case proceedings in the case and respondent had not been served);
Olivar v. Chavez, CV No. 13-4112, 2013 WL 4509972, at *2 (C.D. Cal. Aug. 23, 2013) (same with
respect to untimely petition); Brown v. Baca, CV No. 13-745, 2013 WL 502252, at *1 n.2 (C.D.
Cal. Feb. 8, 2013) (Case No. CV 13-745) (finding that a magistrate judge had jurisdiction to
summarily dismiss a Section 2241 petition brought by a pretrial detainee awaiting criminal trial

1 In addition, pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the
2 United States District Courts, the Court has considered whether a certificate of appealability is
3 warranted in this case. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484-85, 120
4 S. Ct. 1595, 1604 (2000). The Court concludes that a certificate of appealability is unwarranted,
5 and thus, a certificate of appealability is DENIED.

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7 IT IS FURTHER ORDERED that the Clerk of the Court shall refer the Petition to the Ninth
8 Circuit pursuant to Ninth Circuit Rule 22-3(a).

9
10 IT IS SO ORDERED.

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12 DATED: August 26, 2014.

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15 MARGARET A. NAGLE
16 UNITED STATES MAGISTRATE JUDGE
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25 before respondent filed an answer, because the petitioner had consented to magistrate judge
26 jurisdiction and respondent "ha[d] not yet been served with the Petition and therefore [wa]s not
27 a party to this proceeding"); Carter v. Valenzuela, CV 12-5184, 2012 WL 2710876, at *1 n.3 (C.D.
28 Cal. July 9, 2012) (citing Wilhelm and finding that the magistrate judge had the authority to deny
a successive habeas petition when the petitioner had consented and respondent had not yet been
served with petition); Williams v. Ahlin, CV 11-00049, 2011 WL 1549306, at *6-*7 (E.D. Cal. April
21, 2011) (finding that the magistrate judge had jurisdiction to dismiss a habeas action when the
petitioner signed and filed a consent form, and at the time of dismissal, the named respondent
had not appeared in the action).