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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARISTEO SIERRA PARRA,

Petitioner,

v.

WARDEN,

Respondent.

No. 2:14-cv-2062 CKD P

ORDER AND
FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2009 conviction in the Sacramento County Superior Court for second degree murder and assault with a deadly weapon (Cal. Penal Code § 187(a); 254(A)(1)), for which he was sentenced to a state prison term of 19 years to life. (ECF No. 1 at 9.) The court has examined its records and finds that petitioner challenged this same conviction in an earlier action, Parra v. McDonald, 2:12-cv-0335 EFB P (E.D. Cal.), which was dismissed for untimeliness on December 4, 2012.

A petition is second or successive if it makes “claims contesting the same custody imposed by the same judgment of a state court” that the petitioner previously challenged, and on which the federal court issued a decision on the merits. Burton v. Stewart, 549 U.S. 147, 153

1 (2007). A second or subsequent habeas petition is not considered “successive” if the initial
2 habeas petition was dismissed for a technical or procedural reason. See Slack v. McDaniel, 529
3 U.S. 473, 485–487 (2000). However, in McNabb v. Yates, 576 F.3d 1028,1030 (9th Cir. 2009),
4 the Ninth Circuit held that dismissal of a habeas petition for failure to comply with the AEDPA
5 statute of limitations renders subsequent petitions challenging the same conviction successive.
6 Because petitioner’s prior federal habeas petition was dismissed for untimeliness, the instant
7 petition is successive.

8 Before filing a second or successive petition in district court, a petitioner must obtain from
9 the appellate court “an order authorizing the district court to consider the application.” 28 U.S.C.
10 § 2244(b)(3)(A). Without an order from the appellate court, the district court is without
11 jurisdiction to consider a second or successive petition. See Burton, 549 U.S. at 152, 157. As
12 petitioner offers no evidence that the appellate court has authorized this court to consider a second
13 or successive petition challenging his 2009 conviction, this action should be dismissed for lack of
14 jurisdiction.

15 Accordingly, IT IS HEREBY ORDERED THAT:

- 16 1. All pending motions are denied as moot; and
- 17 2. The Clerk of Court is directed to assign a district judge to this action.

18 IT IS HEREBY RECOMMENDED THAT:

- 19 1. The petition be dismissed for lack of jurisdiction; and
- 20 2. This case be closed.

21 These findings and recommendations are submitted to the United States District Judge
22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
23 after being served with these findings and recommendations, petitioner may file written
24 objections with the court. Such a document should be captioned “Objections to Magistrate
25 Judge’s Findings and Recommendations.” Petitioner is advised that failure to file objections

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1 within the specified time may waive the right to appeal the District Court's order. Martinez v.
2 Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: September 10, 2014



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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