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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DARIUS GAINES,

Petitioner,

No. CIV S-10-0429 MCE KJM P

vs.

DARRELL G. ADAMS,

Respondent.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____/

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 together with a request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

Examination of the in forma pauperis affidavit reveals that petitioner is unable to afford the costs of suit. Accordingly, the request for leave to proceed in forma pauperis is granted. See 28 U.S.C. § 1915(a).

The court’s records reveal that petitioner has previously filed an application for a writ of habeas corpus attacking the conviction and sentence challenged in this case. The previous application was filed on January 5, 2004, and was denied on the merits on November 16, 2006. See CIV-S-04-0018 FCD GGH P. Before petitioner can proceed with the instant application he must move in the United States Court of Appeals for the Ninth Circuit for an order

1 authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3). Therefore,
2 petitioner's application must be dismissed without prejudice to its refiling upon obtaining
3 authorization from the United States Court of Appeals for the Ninth Circuit.

4 Accordingly, IT IS HEREBY ORDERED that petitioner's application to proceed
5 in forma pauperis is granted; and

6 IT IS HEREBY RECOMMENDED that this action be dismissed.

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
9 one days after being served with these findings and recommendations, petitioner may file written
10 objections with the court. The document should be captioned "Objections to Magistrate Judge's
11 Findings and Recommendations." Petitioner is advised that failure to file objections within the
12 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
13 F.2d 1153 (9th Cir. 1991).

14 DATED: April 30, 2010.

15 
16 U.S. MAGISTRATE JUDGE

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