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

ERIC WAYNE,

Petitioner,

No. 2:10-cv-1520-JFM (HC)

vs.

WARDEN LOPEZ, et al.,

Respondents.

ORDER AND

FINDINGS & RECOMMENDATIONS

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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, Case No. 2:03-cv-2437-JKS-DAD (HC). The previous application was filed on November 24, 2003, and was denied on the merits on February 1, 2008. 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           Petitioner also includes a prayer for money damages. In Heck v. Humphrey, 512  
5 U.S. 477 (1994), the United States Supreme Court held that a suit for damages concerning an  
6 allegedly unconstitutional conviction or imprisonment cannot be maintained absent proof “that  
7 the conviction or sentence has been reversed on direct appeal, expunged by executive order,  
8 declared invalid by a state tribunal authorized to make such determination, or called into question  
9 by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254.” Heck, 512 U.S. at  
10 486. Pursuant to the rule announced in Heck, petitioner may not seek money damages based on  
11 the conviction challenged herein because the conviction has not been invalidated.

12           In accordance with the above, IT IS HEREBY ORDERED that the Clerk of the  
13 Court is directed to assign this action to a United States District Judge; and

14           IT IS HEREBY RECOMMENDED that this action be dismissed without  
15 prejudice.

16           These findings and recommendations are submitted to the United States District  
17 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
18 days after being served with these findings and recommendations, petitioner may file written  
19 objections with the court. The document should be captioned “Objections to Magistrate Judge’s  
20 Findings and Recommendations.” Any response to the objections shall be filed and served  
21 within fourteen days after service of the objections. Petitioner is advised that failure to file

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1 objections within the specified time may waive the right to appeal the District Court's order.

2 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: June 28, 2010.

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UNITED STATES MAGISTRATE JUDGE

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wayn1520.success

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