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

CALVIN C. JOHNSON, III

Petitioner,

No. CIV S-11-0388 GGH

vs.

VINCENT S. CULLEN

Respondent.

ORDER &

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. See S-03-0479 MCE GGH.¹ The previous application was filed on March 11, 2003, and was denied on the

¹ A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

1 merits on July 26, 2005, and then a final claim was denied on the merits after counsel was
2 appointed on November 8, 2006.

3 Before petitioner can proceed with the instant application he must move in the
4 United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to
5 consider the application. 28 U.S.C. § 2244(b)(3). Therefore, petitioner's application must be
6 dismissed without prejudice to its refiling upon obtaining authorization from the United States
7 Court of Appeals for the Ninth Circuit.

8 In accordance with the above, IT IS HEREBY ORDERED that:

- 9 1. Petitioner's application to proceed in forma pauperis is granted;
10 2. A district judge be assigned to this case.

11 IT IS HEREBY RECOMMENDED that this action be dismissed without
12 prejudice.

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

20 DATED: March 1, 2011

21 /s/ Gregory G. Hollows

22 UNITED STATES MAGISTRATE JUDGE

23 GGH: AB
24 john3888.suc