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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

KENNETH A. FRANK,	)	1:11-CV-01175 AWI GSA HC
	)	
Petitioner,	)	FINDINGS AND RECOMMENDATION
	)	REGARDING PETITION FOR WRIT OF
v.	)	HABEAS CORPUS
	)	
JAMES A. YATES, Warden,	)	
	)	
Respondent.	)	
_____ )	)	

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On July 15, 2011, Petitioner filed the instant petition for writ of habeas corpus in this Court. He challenges his 1989 convictions out of Kern County Superior Court.

**DISCUSSION**

A. Preliminary Review of Petition

Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

The Advisory Committee Notes to Rule 8 indicate that the court may dismiss a petition for writ of habeas corpus, either on its own motion under Rule 4, pursuant to the respondent’s motion to

1 dismiss, or after an answer to the petition has been filed. See Herbst v. Cook, 260 F.3d 1039 (9<sup>th</sup>  
2 Cir.2001). A petition for habeas corpus should not be dismissed without leave to amend unless it  
3 appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson,  
4 440 F.2d 13, 14 (9<sup>th</sup> Cir. 1971).

5 B. Successive Claim

6 In the instant petition in his first claim for relief, Petitioner alleges the Kern County Superior  
7 Court committed prejudicial error when it destroyed the court reporter's notes of Petitioner's jury  
8 trial without complying with relevant California statutes. This claim was raised in a prior federal  
9 petition in this Court where it was dismissed for failure to state a cognizable federal claim.

10 See Frank v. Yates, Case No. 1:10-CV-1212 GSA HC. It is therefore successive and must be  
11 dismissed. See 28 U.S.C. § 2244(b)(1).

12 **RECOMMENDATION**

13 Accordingly, IT IS HEREBY RECOMMENDED that Ground One be DISMISSED from the  
14 petition as successive.

15 This Findings and Recommendation is submitted to the Honorable Anthony W. Ishii, United  
16 States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of  
17 the Local Rules of Practice for the United States District Court, Eastern District of California.

18 Within thirty (30) days of the date of service of this Findings and Recommendation, Petitioner may  
19 file written objections with the Court. Such a document should be captioned "Objections to  
20 Magistrate Judge's Findings and Recommendations." The District Court will then review the  
21 Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to  
22 file objections within the specified time may waive the right to appeal the District Court's order.

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

24  
25 IT IS SO ORDERED.

26 Dated: August 2, 2011

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE