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

DAVID LEE TERRY,

Petitioner,

No. CIV S-06-0244 GEB KJM P

vs.

MULE CREEK STATE PRISON, et al.,

Respondents.

ORDER

_____/

Petitioner is a state prisoner proceeding pro se with this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On February 17, 2009, the court denied petitioner’s motion for reconsideration. Petitioner has now filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. On May 21, 2009, petitioner filed an application to proceed in forma pauperis, which the court denied. On July 7, 2009, petitioner filed a renewed motion to proceed in forma pauperis on appeal. The court file reflects that petitioner paid the filing fee for this action.

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1 Rule 24(a) of the Federal Rules of Appellate Procedure provides that a party to a
2 district court action who desires to proceed in forma pauperis on appeal must file a motion in the
3 district court that:

4 (A) shows in the detail prescribed by Form 4 of the Appendix of
5 Forms the party's inability to pay or to give security for fees and
6 costs;

6 B) claims an entitlement to redress; and

7 (C) states the issues that the party intends to present on appeal.

8 Fed. R. App. P. 24(a)(2). Petitioner's affidavit demonstrates his inability to pay or to give
9 security for fees and costs and he states he wishes to challenge the district court's refusal to
10 allow him to reopen this habeas action and argue that California's timeliness bar is not
11 consistently applied.

12 In findings and recommendations, adopted by the district court, this court found
13 that petitioner's attempt to use the law of procedural default to defeat the AEDPA statute of
14 limitations was unavailing. Docket Nos. 24 & 26. The district court and the Court of Appeals
15 denied petitioner's request for a certificate of appealability. Docket Nos. 30 & 35.

16 Petitioner then filed a motion for relief from judgment, which the district court
17 denied as containing argument that had been or could have been raised initially. Docket No. 38.
18 The district court also denied a request for the issuance of a certificate of appealability. Docket
19 No. 41.

20 In light of this history, this court finds petitioner's appeal frivolous and so denies
21 his request to proceed in forma pauperis on appeal. See 28 U.S.C. § 1915(a)(3).

22 Accordingly, IT IS HEREBY ORDERED that petitioner's request to proceed in
23 forma pauperis on appeal (docket no. 49) is denied.

24 DATED: September 10, 2009.

25 
26 U.S. MAGISTRATE JUDGE