

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

FRANKIE DOSTY,

Petitioner,

No. CIV S-08-2565 FCD EFB P

vs.

M.C. KRAMMER,

Respondent.

FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_/

Petitioner, a state prisoner proceeding without counsel on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On May 27, 2009, the court ordered petitioner to demonstrate either that the petition is not second or successive or submit evidence that the appellate court has authorized this court to consider the petition. The court cautioned petitioner that failure to comply with the order would result in a recommendation that this action be dismissed on the ground that it is a successive petition filed without authorization from the appellate court

On June 30, 2009, petitioner responded to the court’s order. His response concedes that his previous petition was dismissed as untimely. He argues, however, that the instant petition is not successive because it asserts a new ground for relief. The argument fails to address the problem. Asserting a new ground for relief does not mean that the instant petition is not

1 successive. As discussed in the May 27, 2009 order, petitioner is challenging the same judgment  
2 that he previously challenged and which was adjudicated on the merits, which renders the instant  
3 petition successive. *See Burton v. Stewart*, 549 U.S. 147 (2007); *see also Slack v. McDaniel*,  
4 529 U.S. 473, 485-86 (2000). Petitioner has failed to demonstrate that his petition is not second  
5 or successive. He also offers no evidence that the appellate court has authorized this court to  
6 consider a second or successive petition.

7 Accordingly, it is hereby RECOMMENDED that this action be dismissed on the ground  
8 that the petition is second or successive and petitioner has not demonstrated that the United  
9 States Court of Appeals for the Ninth Circuit has granted him leave to file it in this court.

10 These findings and recommendations are submitted to the United States District Judge  
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days after  
12 being served with these findings and recommendations, any party may file written objections  
13 with the court and serve a copy on all parties. Such a document should be captioned “Objections  
14 to Magistrate Judge’s Findings and Recommendations.” Failure to file objections within the  
15 specified time may waive the right to appeal the District Court’s order. *Turner v. Duncan*, 158  
16 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

17 Dated: November 19, 2009.

18   
19 EDMUND F. BRENNAN  
20 UNITED STATES MAGISTRATE JUDGE  
21  
22  
23  
24  
25  
26