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

EARNEST S. HARRIS,  
Petitioner,

No. CIV S-08-2793-CMK-P

vs.

ORDER

ROBERT A. HOREL,  
Respondent.

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Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to the written consent of all parties appearing in the action, this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Pending before the court is respondent’s motion to dismiss (Doc. 11).

Petitioner was convicted following a guilty plea of assault with a deadly weapon, rape, and two counts of battery on a police officer. He admitted that he inflicted great bodily injury and that he had a prior conviction for assault with intent to commit rape. Petitioner was sentenced in April 1995 to a determinate prison term of 15 years and did not appeal the conviction or sentence. Between September 1996 and January 2008, petitioner filed 18 petitions

1 for post-conviction relief in state court. None were granted, except that, upon consideration of  
2 the sixth such petition filed in February 2003, the trial court concluded that it had incorrectly  
3 sentenced petitioner. He was re-sentenced in March 2003 and an amended abstract of judgment  
4 was entered. Petitioner did not appeal the amended judgment.

5           Petitioner has also filed two prior petitions for writs of habeas corpus pursuant to  
6 28 U.S.C. § 2254 in this court. The first such petition was filed in July 1999 and challenged the  
7 original 1995 conviction and sentence. See Harris v. Ayers, E.D. Cal. case no. CIV-S-99-1432-  
8 EJG-JMF-P. The first federal petition was dismissed as untimely. The second petition was filed  
9 in August 2004 and challenged the 2003 amended judgment. See Harris v. Lockyer, E.D. Cal.  
10 case no. CIV-S-04-1906-FCD-KJM-P. The second federal petition was denied on the merits. An  
11 appeal of this decision is currently pending in the Ninth Circuit Court of Appeals. The instant  
12 third federal petition was filed on November 20, 2008.

13           Respondent argues, among other things, that this petition must be dismissed as  
14 second or successive petition filed without first obtaining leave of the circuit court to do so. The  
15 court agrees. This petition is petitioner's third § 2254 petition filed in this court and is  
16 successive to his second case filed in August 2004, which was denied on the merits. See Cooper  
17 v. Calderon, 308 F.3d 1020, 1023-24 (9th Cir. 2002). Under 28 U.S.C. § 2244(b)(3)(A), leave  
18 of the circuit court must be obtained prior to filing a second or successive habeas petition.  
19 Whether petitioner meets the requirements of § 2244(b)(2) for the filing of a second or  
20 successive petition is a determination which must be made by the circuit court in the first  
21 instance. Because petitioner has not obtained leave from the Ninth Circuit to file the instant third  
22 federal petition, it must be dismissed.

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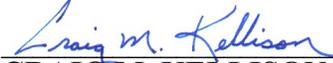
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Accordingly, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss (Doc. 11) is granted; and
2. The Clerk of the Court is directed to enter judgment and close this file.

DATED: April 14, 2009

  
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**CRAIG M. KELLISON**  
UNITED STATES MAGISTRATE JUDGE