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

UVALDO NEVAREZ,

Petitioner,

No. 2:09-cv-0829 FCD JFM P

vs.

A.K. SCRIBNER,

Respondent.

ORDER AND

FINDINGS & 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 instant petition was filed with the court on March 24, 2009. The court's own records reveal that on December 29, 1998, petitioner filed a petition challenging the same

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1 conviction¹ challenged herein. (No. 2:98-cv-2452 GEB JFM P).² Due to the duplicative nature
2 of the present action, the court will recommend that the instant petition be dismissed.

3 Moreover, to the extent petitioner is attempting to raise new claims not included
4 in his prior petition, before petitioner can proceed with an application raising new claims, he
5 must move in the United States Court of Appeals for the Ninth Circuit for an order authorizing
6 the district court to consider the application. 28 U.S.C. § 2244(b)(3). Petitioner cannot refile a
7 challenge to the underlying conviction without first obtaining authorization from the United
8 States Court of Appeals for the Ninth Circuit.

9 Petitioner has also filed a motion for appointment of counsel and for a copy of
10 transcripts. In light of the recommended dismissal, petitioner's motions will be denied without
11 prejudice.

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

13 1. Petitioner's request to proceed in forma pauperis is granted;

14 2. Petitioner's March 24, 2009 motion for appointment of counsel is denied
15 without prejudice; and

16 3. Petitioner's April 9, 2009 motion for a copy of transcripts is denied without
17 prejudice.

18 IT IS HEREBY RECOMMENDED that this action be dismissed without
19 prejudice. See Fed. R. Civ. P. 41(b).

20 These findings and recommendations are submitted to the District Judge assigned
21 to this case pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being
22

23 ¹ Although the instant petition states petitioner was convicted in 1993, and the previous
24 application states he was convicted in 1994, both petitions challenge his conviction for one count
25 of second degree murder and four counts of attempted second degree murder. Both petitions
reference the California Supreme Court's July 26, 1995 denial of his petition for review.

26 ² 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 served with these findings and recommendations, petitioner may file written objections with the
2 court. The document should be captioned "Objections to Magistrate Judge's Findings and
3 Recommendations." Petitioner is advised that failure to file objections within the specified time
4 may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th
5 Cir. 1991).

6 DATED: April 15, 2009.

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9 UNITED STATES MAGISTRATE JUDGE

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