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

GREGORY ANTHONY POWELL,

Petitioner,

No. CIV S-09-1823 DAD P

vs.

D.K. SISTO,

Respondent.

ORDER AND  
FINDINGS AND 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. This action was transferred to this court from the U.S. District Court for the Northern District of California.

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 court must now determine if the action is frivolous or malicious.

In considering whether to dismiss an action as frivolous pursuant to § 1915(d), the court has especially broad discretion. Conway v. Fugge, 439 F.2d 1397 (9th Cir. 1971). The Ninth Circuit has held that an action is frivolous if it lacks arguable substance in law and fact. Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court's determination of whether a claim is frivolous is based on “an assessment of the substance of the claim presented, i.e., is there a factual

1 and legal basis, of constitutional dimension, for the asserted wrong, however inartfully pleaded.”  
2 Franklin, 745 F.2d at 1227 (citations omitted).

3 Petitioner's pending application for habeas relief in this matter was originally filed  
4 with the U.S. District Court for the Northern District of California on June 17, 2009. This court's  
5 own records reveal that on May 28, 2009, petitioner filed a petition in this court containing virtually  
6 identical allegations and claims challenging his 2003 judgment of conviction entered in the Solano  
7 County Superior Court. (No. Civ. S-09-1598 EFB P).<sup>1</sup> Due to the duplicative nature of the present  
8 action, the court finds it frivolous and, therefore, will dismiss the petition. 28 U.S.C. § 1915(d).

9 Accordingly, IT IS HEREBY ORDERED that:

10 1. Petitioner's June 17, 2009 motion to proceed in forma pauperis (Doc. No. 2) is  
11 granted; and

12 2. This action shall be randomly assigned to a U.S. District Judge.

13 Also, IT IS HEREBY RECOMMENDED that this action be dismissed without  
14 prejudice. See Fed. R. Civ. P. 41(b).

15 These findings and recommendations are submitted to the District Judge assigned to  
16 this case pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being  
17 served with these findings and recommendations, petitioner may file written objections with the  
18 court. The document should be captioned “Objections to Magistrate Judge's Findings and  
19 Recommendations.” Petitioner is advised that failure to file objections within the specified time may  
20 waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: March 31, 2010.

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DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE

<sup>1</sup> 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).