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

HERBERT C. VICE,

Petitioner,

No. CIV S-09-2647 EFB P

vs.

JAMES WALKER,

Respondent.

ORDER

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Petitioner, a state prisoner without counsel, has filed a petition for a writ of habeas corpus. See 28 U.S.C. § 2254. Petitioner seeks leave to proceed *in forma pauperis*. See 28 U.S.C. § 1915(a).

Examination of the *in forma pauperis* affidavit reveals that petitioner is unable to afford the costs of suit.

The court has reviewed the petition as required by Rule 4 of the Rules Governing Section 2254 Proceedings, and finds that the petition appears to be second or successive. Thus, petitioner must show either that the petition is not second or successive or that he has obtained permission to proceed from the appellate court.

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1 A petition is second or successive if it makes “claims contesting the same custody
2 imposed by the same judgment of a state court” that the petitioner previously challenged, and on
3 which the federal court issued a decision on the merits. *Burton v. Stewart*, 549 U.S. 147 (2007);
4 *see also Slack v. McDaniel*, 529 U.S. 473, 485-86 (2000). Before filing a second or successive
5 petition in a district court, a petitioner must obtain from the appellate court “an order authorizing
6 the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). Without an order
7 from the appellate court, the district court is without jurisdiction to consider a second or
8 successive petition. *See Burton*, 549 U.S. 147.

9 In the present action, petitioner challenges a July 25, 2001 conviction in the Yolo
10 County Superior Court for first degree burglary and several sentencing enhancements, which
11 resulted in an aggregate state prison term of 20 years. Pet. at 2, Ex. A at 2. The court has
12 examined its records, and finds that petitioner challenged the same conviction in case number
13 Civ. S-04-0044 GEB CMK.¹ That petition was denied on its merits. *Vice v. Pliler*, No. Civ. S-
14 04-0044 GEB CMK, Docket No. 17, 21. Since petitioner challenges the same judgment now
15 that he previously challenged and which was adjudicated on the merits, it appears that the
16 September 22, 2009, petition is second or successive. Petitioner offers no evidence that the
17 appellate court has authorized this court to consider a second or successive petition.

18 Accordingly, it hereby is ORDERED that;

- 19 1. Petitioner’s request for leave to proceed *in forma pauperis* is granted; and
20 2. Petitioner shall, within 30 days of the date this order is served, demonstrate either that
21 this petition is not second or successive or submit evidence that the appellate court has
22 authorized this court to consider the petition. Petitioner’s failure to comply with this order will


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26 ¹ 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 result in a recommendation that this action be dismissed upon the ground that petitioner has
2 without authorization filed a second or successive petition.

3 Dated: February 25, 2010.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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