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

BOBBY H. ELLINGTON, SR.,

Petitioner,

No. CIV S-09-2815 KJM P

vs.

STATE OF CALIFORNIA,

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. The court’s records reveal that petitioner has previously filed an application for a writ of habeas corpus attacking the conviction and sentence challenged in this case. The previous application was filed on February 9, 2001, and was denied on the merits on February 10, 2006. See Ellington v. California, CIV-S-01-0273 JKS KJM P. Before petitioner can proceed with the instant application he must move in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3). Therefore, petitioner's application must be dismissed without prejudice to its refiling upon obtaining authorization from the United States Court of Appeals for the Ninth Circuit.

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1 Accordingly, IT IS HEREBY ORDERED that the clerk of the court assign this
2 action to a district court judge; and

3 IT IS HEREBY RECOMMENDED that this action be dismissed without
4 prejudice to refiling upon obtaining authorization from the United States Court of Appeals for
5 the Ninth Circuit.

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

13 DATED: October 19, 2009.

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15 U.S. MAGISTRATE JUDGE

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