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

KEITH D. JOHNSON,

Petitioner,

No. CIV S-10-0966 DAD P

vs.

JAMES A. YATES,

ORDER

Respondent.

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On October 26, 2009, petitioner filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 directly with the Ninth Circuit Court of Appeals. On January 14, 2010, the Appellate Commissioner directed that the Clerk of that court transfer the petition, and the motion for appointment of counsel that accompanied it, to this court. However, the petition was not received by the Clerk of this court for filing until April 21, 2010. After a careful review of the petition, the undersigned has determined that this action has been opened as a new habeas corpus case in error.

In this regard, the court’s records reveal that petitioner previously filed an application for a writ of habeas corpus attacking the judgment of conviction and sentence entered against him in the Sacramento County Superior Court on the same grounds presented in this habeas petition. The previous habeas application was filed with this court on February 28, 2006.

1 See Johnson v. Yates, No. Civ. S-06-0554 MCE CHS P. Therein, petitioner alleged, as he does  
2 in his more recent petition, that: (1) both his trial and appellate counsel rendered ineffective  
3 assistance; (2) the prosecution engaged in misconduct that violated his right to a fair trial; (3) the  
4 trial judge was partial and biased; (4) there was insufficient evidence to support the deadly  
5 weapon use enhancement applied to each count of conviction; and (5) the cumulative effect of  
6 these errors deprived him of a fair trial. On August 25, 2009, United States Magistrate Judge  
7 Charlene Sorrentino issued findings and recommendations recommending that petitioner's  
8 application for writ of habeas corpus in Johnson v. Yates, No. Civ. S-06-0554 MCE CHS P be  
9 denied on the merits. By order filed September 30, 2009, United States District Judge Morrison  
10 England adopted those findings and recommendations in full and closed that case.<sup>1</sup>

11 In light of petitioner's identical habeas corpus petition previously filed in Johnson  
12 v. Yates, No. Civ. S-06-0554 MCE CHS P, this court's denial of that federal habeas petition on  
13 the merits on September 30, 2009, and petitioner's subsequent filing of the same petition in the  
14 Ninth Circuit Court of Appeals within thirty days of the order denying relief, the undersigned  
15 concludes that petitioner was not seeking to file a new petition for writ of habeas corpus when he  
16 submitted his petition to the Ninth Circuit Court of Appeals but was instead attempting to appeal  
17 this court's earlier decision denying habeas relief in Johnson v. Yates, No. Civ. S-06-0554 MCE  
18 CHS P.

19 Accordingly, IT IS HEREBY ORDERED that:

20 1. The Clerk of the Court is directed to administratively close this case as having  
21 been opened in error;

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24 <sup>1</sup> Petitioner filed the instant application for writ of habeas corpus in the Ninth Circuit  
25 Court of Appeals less than one month later on October 26, 2009. Moreover, it is noteworthy that  
26 under state procedural rules in California it is appropriate for a petitioner denied habeas relief by  
the trial court to pursue review of that decision by filing his habeas petition in the appellate court  
rather than by filing a notice of appeal.

