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

JEFFREY HENDERSON,

Petitioner,

No. 2:10-cv-2787 KJN P

vs.

McDONALD, Warden,

ORDER and

Respondent.

FINDINGS AND RECOMMENDATIONS

_____ /

Petitioner, a state prisoner proceeding without counsel, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, together with a motion to proceed in forma pauperis and a motion for appointment of counsel.

The court’s records reveal that petitioner has previously filed an application for a writ of habeas corpus attacking the 2001 conviction and sentence challenged in this case. The previous application was filed on July 13, 2004, and was denied on the merits on May 31, 2007. See Docket in Henderson v. Knowles, 2:04-cv-01341GEB CMK P. On September 29, 2008, the Ninth Circuit Court of Appeals denied petitioner’s request for a certificate of appealability.

Petitioner filed the instant petition on October 14, 2010, which appears both to directly challenge his conviction and to seek a Certificate of Appealability. The instant petition follows the United States Supreme Court’s October 4, 2010 denial of petitioner’s petition for a

1 writ of certiorari. (Dkt. No. 1, at p. 45.) Previously, on June 24, 2009, the Sacramento County
2 Superior Court denied petitioner's "third" petition for a writ of habeas corpus, finding that it was
3 "successive and untimely." (Id. at 35-37.) Thereafter, on June 30, 2009, the Third District
4 California Court of Appeal denied petitioner's application for a writ of habeas corpus, and, on
5 March 24, 2010, the California Supreme Court denied petitioner's application for a writ habeas
6 corpus. (Id. at 39, 43.)

7 Before petitioner can proceed with the instant application he must move in the
8 United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to
9 consider the application. 28 U.S.C. § 2244(b)(3). Thus, petitioner's application for a writ of
10 habeas corpus must be dismissed without prejudice to its refiling should petitioner obtain
11 authorization from the Court of Appeals. The Clerk of the Court will therefore be directed to
12 forward petitioner's October 14, 2010 motions, along with a copy of the October 14, 2010
13 petition, to United States Court of Appeals for the Ninth Circuit.

14 Accordingly, IT IS HEREBY ORDERED that:

15 1. The Clerk of Court shall forward petitioner's October 14, 2010 motions (Dkt.
16 Nos. 2 and 3), and a copy of the August 16, 2010 petition (Dkt. No. 1), to the United States Court
17 of Appeals for the Ninth Circuit; and

18 2. The Clerk of Court is directed to randomly assign a district judge to this action.

19 Further, IT IS HEREBY RECOMMENDED that this action be dismissed without
20 prejudice.

21 These findings and recommendations are submitted to the United States District
22 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
23 one days after being served with these findings and recommendations, petitioner may file written
24 objections with the court. The document should be captioned "Objections to Magistrate Judge's
25 Findings and Recommendations." Petitioner is advised that failure to file objections within the

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1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
2 F.2d 1153 (9th Cir. 1991).

3 DATED: October 27, 2010

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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