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

CHANDRA KISHOR,

Plaintiff,

No. 2:10-cv-3171 LKK KJN P

vs.

PEOPLE OF THE STATE OF  
CALIFORNIA,

Defendant.

ORDER AND

FINDINGS AND RECOMMENDATIONS

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Plaintiff, a state prisoner proceeding without counsel, has requested leave to proceed in forma pauperis. Examination of the affidavit reveals plaintiff is unable to afford the costs of this action. Accordingly, leave to proceed in forma pauperis is granted. 28 U.S.C. § 1915(a).

Plaintiff has filed a document styled, "Notice of Request to Recall Sentence. . . ." (Dkt. No. 1.) Plaintiff claims he was illegally sentenced and seeks to have his criminal sentence recalled, relying on California state law. Plaintiff included a Sacramento County Superior Court criminal case number in the caption of his filing: 98F01523. Plaintiff then recites a litany of "mitigation factors," such as judicial misconduct, prosecutorial misconduct, etc., and references various incidents during his Sacramento County criminal prosecution in 1999 and 2000. Plaintiff

1 also attaches various documents that appear to have been filed in Case No. 98F01523.<sup>1</sup> Plaintiff  
2 does not seek monetary damages, but appears to seek release from state prison. Review of court  
3 records in Sacramento County Superior Court Case No. 98F01523,<sup>2</sup> demonstrates that plaintiff  
4 was sentenced on January 14, 2000.<sup>3</sup>

5           Where a prisoner challenges either the fact or the duration of his confinement, his  
6 sole remedy is habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

7           Review of records filed in the Eastern District reveals plaintiff has previously  
8 challenged his underlying conviction on at least three separate occasions: Case No. 2:03-cv-1219  
9 LKK CMK; Case No. 2:06-cv-1592 GEB KJM; and Case No. 2:08-cv-2028 FCD JFM. Plaintiff  
10 was informed in 2:08-cv-2028 FCD JFM, that he may only pursue a successive petition by first  
11 obtaining permission from the United States Court of Appeals for the Ninth Circuit. (Id., Dkt.  
12 No. 6.)

13           Because plaintiff is challenging the fact or duration of his confinement, his filing  
14 must be construed as a petition for writ of habeas corpus. Because plaintiff has previously  
15 challenged his underlying conviction, he must first move in the United States Court of Appeals  
16 for the Ninth Circuit for an order authorizing the district court to consider the instant filing. 28  
17 U.S.C. § 2244(b)(3). Therefore, this action must be dismissed without prejudice to its refiling  
18 upon obtaining authorization from the United States Court of Appeals for the Ninth Circuit.

19           On December 22, 2010, plaintiff filed a motion for appointment of counsel. In  
20 light of the recommendation that this action be dismissed, plaintiff's motion is denied without

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22 <sup>1</sup> Plaintiff also mentions a denial of parole for a period of ten years. However, plaintiff is  
presently challenging the 2010 denial of parole in Case No. 2:10-cv-3101 KJM EFB P.

23 <sup>2</sup> A court may take judicial notice of court records. See, e.g., Bennett v. Medtronic, Inc.,  
24 285 F.3d 801, 803 n.2 (9th Cir. 2002) (“[W]e may take notice of proceedings in other courts,  
25 both within and without the federal judicial system, if those proceedings have a direct relation to  
26 matters at issue”) (internal quotation omitted).

<sup>3</sup> Sacramento County Superior Court Index Search System, accessed April 13, 2011  
<<https://services.saccourt.com/indexsearchnew/CriminalSearchV2.aspx>>.

1 prejudice.

2 Accordingly, IT IS HEREBY ORDERED that:

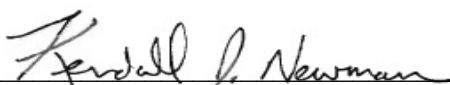
- 3 1. Plaintiff is granted leave to proceed in forma pauperis (Dkt. Nos. 7, 8 & 10);  
4 2. Plaintiff's December 22, 2010 motion for appointment of counsel (Dkt. No. 9)

5 is denied; and

6 Further, IT IS HEREBY RECOMMENDED that this action be dismissed without  
7 prejudice.

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

15 DATED: April 14, 2011

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18 KENDALL J. NEWMAN  
19 UNITED STATES MAGISTRATE JUDGE

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