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

TIMOTHY RAY BAKER,

Petitioner,

No. 2:11-cv-1317 KJN P

vs.

TIM VIRGA, Warden,

Respondents.

ORDER AND

FINDINGS & 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 request to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

Examination of the in forma pauperis affidavit reveals that petitioner is unable to afford the costs of suit. Accordingly, the request for leave to proceed in forma pauperis is granted. See 28 U.S.C. § 1915(a).

The court’s records reveal that petitioner has previously filed an application for a writ of habeas corpus attacking the 1997 conviction and sentence challenged in this case. The previous application was filed on November 24, 2003, and was dismissed as barred by the statute of limitations on June 25, 2004. Baker v. LaMarque, Case No. 2:03-cv-2441 GEB GGH P. Before petitioner can proceed with the instant application he must move in the United States

1 Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider the
2 application. 28 U.S.C. § 2244(b)(3). “[D]ismissal of a section 2254 habeas petition for failure to
3 comply with the statute of limitations renders subsequent petitions second or successive for
4 purposes of the AEDPA, 28 U.S.C. § 2244(b).” McNabb v. Yates, 576 F.3d 1028 (9th Cir.
5 2009). Therefore, petitioner’s application must be dismissed without prejudice to its refileing
6 upon obtaining authorization from the United States Court of Appeals for the Ninth Circuit.

7 In light of this recommendation, petitioner’s May 16, 2011 motion for application
8 of equitable tolling is denied without prejudice.

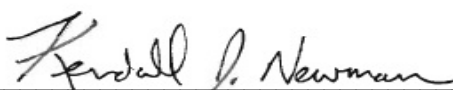
9 In accordance with the above, IT IS HEREBY ORDERED that:

- 10 1. Petitioner’s application to proceed in forma pauperis is granted;
- 11 2. The Clerk of the Court is directed to assign a district judge to this case;
- 12 3. Petitioner’s May 16, 2011 motion for application of equitable tolling (dkt. no.
13 4) is denied without prejudice.

14 IT IS HEREBY RECOMMENDED that this action be dismissed without
15 prejudice.

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

23 DATED: June 21, 2011

24 
25 KENDALL J. NEWMAN
26 UNITED STATES MAGISTRATE JUDGE