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

MARQUIEST LEON MURPHY,

Petitioner,

No. 2: 11-cv-1551 KJN P

vs.

WARDEN VIRGA,

Respondent.

ORDER

\_\_\_\_\_ /

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

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

Petitioner challenges his 2004 conviction for two counts of attempted murder. The petition raises two claims. First, petitioner appears to raise a claim of actual innocence based on newly discovered evidence. Second, petitioner argues that his counsel was ineffective for failing to call witnesses at an evidentiary hearing.

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1 Court records indicate that petitioner is proceeding with another habeas action in  
2 this court also challenging his 2004 conviction for two counts of attempted murder, 2:08-cv-256  
3 GHK P. The petition filed in 08-256 does not raise either of the claims raised in the instant  
4 action. However, on June 7, 2010, 08-256 was stayed so that petitioner could exhaust additional  
5 claims.

6 Petitioner may not proceed with two different habeas actions challenging the same  
7 conviction. Accordingly, the petition filed in the instant action is construed as a motion to amend  
8 the petition filed in 08-256. See Woods v. Carey, 525 F.3d 886, 888-890 (9th Cir. 2008) (if prior  
9 habeas petition still pending when subsequent habeas petition filed, court should not deem  
10 subsequent petition successive but instead should construe subsequent petition as motion to  
11 amend first habeas petition)

12 Accordingly, IT IS HEREBY ORDERED that:

- 13 1. Petitioner's motion to proceed in forma pauperis (Dkt. No. 2) be granted;
- 14 2. The petition filed in the instant action is construed as a motion to amend the  
15 petition filed in 08-256;
- 16 3. The Clerk of the Court is directed to file the petition filed in the instant action  
17 as an amended petition in 08-256;
- 18 4. This action is closed.

19 DATED: June 21, 2011

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22 KENDALL J. NEWMAN  
23 UNITED STATES MAGISTRATE JUDGE

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