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

DEWEY JOE DUFF,

Petitioner,

No. 2:12-cv-01258 LKK KJN

vs.

DEATH PENALTY CASE

WARDEN,  
San Quentin State Prison,

Respondent.

FINDINGS & RECOMMENDATIONS

\_\_\_\_\_ /  
Petitioner is a state prisoner under sentence of death. On May 9, 2012, he filed with this court a petition for writ of habeas corpus under 28 U.S.C. § 2241. On March 6, 2013, the court appointed counsel to represent petitioner in these proceedings.

This court lacks jurisdiction to consider petitioner’s claims under 28 U.S.C. §2241. Because petitioner “was ‘in custody pursuant to a state court judgment’ at the time he filed his federal habeas petition, 28 U.S.C. § 2254 is the proper jurisdictional basis for his habeas petition.” White v. Lambert, 370 F.3d 1002, 1006-08 (9th Cir. 2004), overruled on other grounds


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1 by Hayward v. Marshall, 603 F.3d 546, 554 (9th Cir. 2010);<sup>1</sup> Weaver v. Chappell, 2012 WL  
2 3999848 (S.D. Cal. Sept. 10, 2012).

3           Accordingly, this court HEREBY RECOMMENDS that petitioner’s petition be  
4 dismissed without prejudice.

5           These findings and recommendations are submitted to the United States District  
6 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
7 days after being served with these findings and recommendations, any party may file written  
8 objections with the court and serve a copy on all parties. Such a document should be captioned  
9 “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that  
10 failure to file objections within the specified time may waive the right to appeal the District  
11 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

12 DATED: November 12, 2013

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15 KENDALL J. NEWMAN  
16 UNITED STATES MAGISTRATE JUDGE

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<sup>1</sup> In Washington v. Swarthout, 2011 WL 333318 (E.D. Cal. Jan. 31, 2011), this court recognized that the United States Supreme Court essentially overruled Hayward in Swarthout v. Cooke, 131 S. Ct. 859 (2011).