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8	UNITED STATES DISTRICT COURT	
9	FOR THE EASTERN DISTRICT OF CALIFORNIA	
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11	CARLOS FOSTER,	No. 2:13-cv-2138 KJM GGH P
12	Petitioner,	ORDER AND
13	V.	FINDINGS AND RECOMMENDATIONS
14	TIM VIRGA,	
15	Respondent.	
16		
17	Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas	
18	corpus pursuant to 28 U.S.C. § 2254 together with a request to proceed in forma pauperis	
19	pursuant to 28 U.S.C. § 1915.	
20	Examination of the in forma pauperis affidavit reveals that petitioner is unable to afford	
21	the costs of suit. Accordingly, the request for leave to proceed in forma pauperis is granted. See	
22	28 U.S.C. § 1915(a).	
23	The court's records reveal that petitioner has previously filed an application for a writ of	
24	habeas corpus attacking the conviction and sentence challenged in this case. The previous	
25	application was filed on May 24, 2012, and was denied on the merits on March 29, 2013. See	
26	Foster v. Virga, No. 2:12-cv-1460 CKD. Before petitioner can proceed with the instant	
2728	The previous petition was dismissed as time barred which is a decision on the merits. <u>See McNabb v. Yates</u> , 576 F.3d 1028, 1029-30 (9th Cir. 2009).	

application, he must move in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3). Therefore, petitioner's application must be dismissed without prejudice to its refiling upon obtaining authorization from the United States Court of Appeals for the Ninth Circuit. In accordance with the above, IT IS HEREBY ORDERED that petitioner's application to proceed in forma pauperis is granted; and IT IS RECOMMENDED that this action be dismissed without prejudice. These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, petitioner may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Petitioner is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). Dated: November 5, 2013 /s/ Gregory G. Hollows UNITED STATES MAGISTRATE JUDGE GGH:076/Fost2138.success