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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES R. SMITH,
Petitioner,
V.
FRED FOULK, Warden,¹
Respondent.

No. 2:13-cv-02387-KJN P
ORDER and
FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, 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).

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¹ High Desert State Prison **Error! Main Document Only.** Warden Fred Foulk is substituted as respondent herein. Petitioner improperly named as respondent the “People of the State of California.” A federal petition for writ of habeas corpus must name as respondent the state officer having custody of petitioner. See 28 U.S.C. § 2254; Rule 2(a), Rules Governing Section 2254 Cases in the United States District Courts; Smith v. Idaho, 392 F.3d 350, 354-55 (9th Cir. 2004); Stanley v. California Supreme Court, 21 F.3d 359, 360 (9th Cir. 1994).

1 The court's records reveal that petitioner filed a prior federal petition for writ of habeas
2 corpus attacking the conviction and sentence challenged in the instant case. See Smith v.
3 McDonald, Case No. 2:09-cv-02967-MCE-GGH P. The previous petition was filed on October
4 23, 2009, and was denied on the merits by orders filed April 9, 2012, and March 8, 2013. (Id.,
5 ECF Nos. 51, 55.)

6 Before petitioner can proceed with the instant petition, he must obtain leave from the
7 Ninth Circuit Court of Appeals, authorizing the district court to consider the petition. 28 U.S.C. §
8 2244(b)(3). Therefore, the instant petition must be dismissed without prejudice to its refileing
9 should petitioner obtain such authorization from the United States Court of Appeals for the Ninth
10 Circuit.

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

- 12 1. Petitioner's application to proceed in forma pauperis is granted; and
- 13 2. The Clerk of Court is directed to randomly assign a district judge to this action.


14 Further, IT IS HEREBY RECOMMENDED that:

- 15 1. This action be dismissed without prejudice.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
18 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: November 21, 2013

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE