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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES R. SMITH,
Petitioner,
v.
FRED FOULK, Warden,
Respondent.

No. 13-cv-2387-KJN-P

ORDER

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On November 21, 2013, the undersigned granted petitioner’s request to proceed in forma pauperis and recommended dismissal of this action without prejudice. (ECF No. 4.) As the court explained (id. at 2):

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

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

1 Petitioner thereafter filed a notice of consent to proceed pursuant to the jurisdiction of the
2 undersigned magistrate judge for all purposes. (ECF No. 5.) 28 U.S.C. § 636(c); Local Rule
3 305(a). Petitioner did not file objections to the findings and recommendations, and there is no
4 basis for modifying the undersigned's prior conclusion that this action should be dismissed.

5 For these reasons, and good cause appearing, IT IS HEREBY ORDERED that:

6 1. The Clerk of Court shall: (a) redesignate the undersigned's findings and
7 recommendations filed November 21, 2013 (ECF No. 4) as an Order; and (b) withdraw the
8 assignment of a district judge in this action;


9 2. For the reasons stated in this court's order filed November 21, 2013, this action is
10 dismissed without prejudice; and

11 3. The court declines to issue the certificate of appealability referenced in 28 U.S.C. §
12 2253.

13 SO ORDERED.

14 Dated: December 18, 2013

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE