

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

No. 2:14-cv-0529 JAM KJN P

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.

Petitioner did not file his request to proceed in forma pauperis on the court’s form, but review of his affidavit filed in Smith v. Foulk, Case No. 2:13-cv-2387 KJN P (E.D. Cal.) (ECF No. 2), reveals that he 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).

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.)

1 Before petitioner can proceed with the instant petition, he must obtain leave from the  
2 Ninth Circuit Court of Appeals, authorizing the district court to consider the petition. 28 U.S.C.  
3 § 2244(b)(3). Therefore, the instant petition must be dismissed without prejudice to its refiling  
4 should petitioner obtain such authorization from the United States Court of Appeals for the Ninth  
5 Circuit.<sup>1</sup>


6 In accordance with the above, IT IS HEREBY ORDERED that petitioner's application to  
7 proceed in forma pauperis is granted; and

8 Further, IT IS HEREBY RECOMMENDED that this action be dismissed without  
9 prejudice.

10 These findings and recommendations are submitted to the United States District Judge  
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
12 after being served with these findings and recommendations, petitioner may file written  
13 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
14 Findings and Recommendations." If petitioner files objections, he shall also address whether a  
15 certificate of appealability should issue and, if so, why and as to which issues. A certificate of  
16 appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial  
17 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). Petitioner is advised that  
18 failure to file objections within the specified time may waive the right to appeal the District  
19 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 Dated: April 2, 2014

21 /smit0529.succ

  
KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

22  
23  
24  
25  
26 <sup>1</sup> This is the second petition for writ of habeas corpus that petitioner has filed since his original  
27 petition was denied on the merits. See Smith v. Foulk, 2:13-cv-2387 KJN P, filed November 18,  
28 2013, and dismissed without prejudice on December 18, 2013, based on petitioner's failure to  
first seek authorization from the United States Court of Appeals for the Ninth Circuit. Id., ECF  
No. 6.