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

KENNETH KNANISHU,

No. 2:14-CV-0579-TLN-CMK-P

Petitioner,

vs.

FINDINGS AND RECOMMENDATIONS

SPEARMAN,

Respondent.

_____ /

Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is respondent’s unopposed motion to dismiss (Doc. 23).

Respondent argues, among other things, that this court lacks jurisdiction to consider the instant petition because it is a second or successive petition filed without first obtaining authorization from the Ninth Circuit Court of Appeals. Under 28 U.S.C. § 2244(b)(1), “[a] claim presented in a second or successive habeas corpus application . . . that was presented in a prior application shall be dismissed.” Under § 2244(b)(2), “[a] claim presented in a second or successive habeas corpus application . . . that was not presented in a prior application shall be

1 dismissed. . . .” unless one of two circumstances exist. Either the newly raised claim must rely
2 on a new rule of constitutional law, or the factual predicate of the new claim could not have been
3 discovered earlier through the exercise of due diligence and the new claim, if proven, establishes
4 actual innocence. See id. Before a second or successive petition can be filed in the district
5 court, however, the petitioner must first obtain leave of the Court of Appeals. See 28 U.S.C.
6 § 2244(b)(3). In the absence of proper authorization from the Court of Appeals, the district court
7 lacks jurisdiction to consider a second or successive petition and must dismiss it. See Cooper v.
8 Calderon, 274 F.3d 1270 (9th Cir. 2001) (per curiam).

9 A second petition can only be successive of a prior petition which has been
10 decided on the merits. Woods v. Carey, 525 F.3d 886, 888 (9th Cir. 2008). A decision on the
11 merits occurs if the district court either considers and rejects the claims or determines that the
12 claims will not be considered by a federal court. See Howard v. Lewis, 905 F.2d 1318, 1322-23
13 (9th Cir. 1990). Where a prior petition has been dismissed without prejudice for failure to
14 exhaust state court remedies, the dismissal does not result in an adjudication on the merits
15 because the possibility of returning to court following exhaustion exists and a habeas petition
16 filed in the district court after the initial petition was dismissed is not second or successive. See
17 Slack v. McDaniel, 529 U.S. 473, 485-86 (2000). The dismissal of a petition as untimely,
18 however, does constitute a decision on the merits because such a dismissal is a determination that
19 the claims will not be considered. See McNabb v. Yates, 576 F.3d 1028, 1029-30 (9th Cir.
20 2009). Likewise, the denial of a petition on procedural default grounds is also a determination
21 on the merits. See Henderson v. Lampert, 396 F.3d 1049, 1053 (9th Cir. 2005) (citing Howard,
22 905 F.2d at 1322-23, and stating that the denial of a petition on procedural default grounds is a
23 determination that the claims will not be considered by the federal court).

24 A review of petitioner’s filings in this court reflects that petitioner filed a prior
25 habeas action, Knanishu v. Hedgpeth, 2:10-CV-2171-CMK, in August 2010. That petition was
26 dismissed as untimely on February 28, 2011. Because petitioner has not obtained prior

1 authorization from the Ninth Circuit to file the instant petition, the court agrees with respondent
2 that it must be dismissed for lack of jurisdiction.

3 Based on the foregoing, the undersigned recommends that respondent's
4 unopposed motion to dismiss (Doc. 23) be granted.

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 14 days
7 after being served with these findings and recommendations, any party may file written
8 objections with the court. Responses to objections shall be filed within 14 days after service of
9 objections. Failure to file objections within the specified time may waive the right to appeal.
10 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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12 DATED: August 18, 2015

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14 **CRAIG M. KELLISON**
15 UNITED STATES MAGISTRATE JUDGE
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