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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VICTOR ANTHONY ORTEGA,
Petitioner,

v.

WARDEN MARION E. SPEARMAN,
Respondent.

No. 2:17-cv-1420 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).

The court’s records reveal that petitioner has previously filed an application for a writ of habeas corpus attacking the conviction and sentence challenged in this case. The previous application was filed on September 16, 2013, and was denied on the merits on June 15, 2017.¹ Before petitioner can proceed with the instant application, he must move in the United States

¹ Petitioner filed an appeal, which is still pending in the Court of Appeals for the Ninth Circuit. Id.

1 Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider the
2 application. 28 U.S.C. § 2244(b)(3). Therefore, petitioner’s application must be dismissed
3 without prejudice to its re-filing upon obtaining authorization from the United States Court of
4 Appeals for the Ninth Circuit.


5 With his petition, petitioner filed a request for appointment of counsel at his anticipated
6 re-sentencing. In light of the recommended dismissal, petitioner’s request is denied without
7 prejudice.

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

- 9 1. Petitioner’s application to proceed in forma pauperis (ECF No. 2) is granted;
 - 10 2. Petitioner’s request for appointment of counsel (ECF No. 3) is denied without
11 prejudice;
 - 12 3. The Clerk of the Court is directed to assign a district judge to this case; and
- 13 IT IS RECOMMENDED that this action be dismissed without prejudice.

14 These findings and recommendations are submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
16 after being served with these findings and recommendations, petitioner may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files objections,
19 he shall also address whether a certificate of appealability should issue and, if so, why and as to
20 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the
21 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C.
22 § 2253(c)(3). Petitioner is advised that failure to file objections within the specified time may
23 waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.
24 1991).

25 Dated: July 25, 2017

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27 _____
28 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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