

APR 19 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>EARNEST S. HARRIS,</p> <p>Petitioner - Appellant,</p> <p>v.</p> <p>ROBERT A. HOREL, Warden,</p> <p>Respondent - Appellee.</p>
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No. 08-16571

D.C. No. 2:07-CV-00939-LKK

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
Lawrence K. Karlton, District Judge, Presiding

Submitted April 5, 2010\*\*

Before: RYMER, McKEOWN, and PAEZ, Circuit Judges.

California state prisoner Earnest S. Harris appeals pro se from the district court's judgment dismissing his 28 U.S.C. § 2254 habeas petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we vacate and remand.

Harris contends that the instant habeas petition should not have been

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

dismissed as successive. Because the instant pro se habeas petition was filed before adjudication of Harris' earlier petition was complete, we vacate the district court's order dismissing the instant petition as successive, and remand with instructions to construe the instant petition as a motion to amend the earlier petition then pending in the district court. *See Woods v. Carey*, 525 F.3d 886, 888-890 (9th Cir. 2008).

**VACATED and REMANDED.**