

1 original petition or the opposition to the motion to dismiss does Petitioner provide a date or
2 transcript of the BPH hearing he purports to challenge in these proceedings. However, along with his
3 petition, Petitioner did attempt to file a series of paper exhibits that, ultimately, were lodged, rather
4 than filed, by the Clerk of the Court. (Doc. 2). Accordingly, those lodged exhibits were not
5 scanned, and therefore were not available to be viewed on the Court’s electronic case management
6 system by Respondent.

7 **DISCUSSION**

8 A. Procedural Grounds for Motion to Dismiss

9 Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a
10 petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the
11 petitioner is not entitled to relief in the district court” Rule 4 of the Rules Governing Section
12 2254 Cases.

13 The Ninth Circuit has allowed Respondent’s to file a Motion to Dismiss in lieu of an Answer
14 if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the
15 state’s procedural rules. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule
16 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874
17 F.2d 599, 602-03 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for
18 state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same).
19 Thus, a Respondent can file a Motion to Dismiss after the court orders a response, and the Court
20 should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

21 In this case, Respondent's Motion to Dismiss is based on a violation of 28 U.S.C.
22 2244(b)(3)'s prohibition against second and successive habeas corpus petitions. Because
23 Respondent's Motion to Dismiss is similar in procedural standing to a Motion to Dismiss for failure
24 to exhaust state remedies or for state procedural default, and because Respondent has not yet filed a
25 formal Answer, the Court will review Respondent’s Motion to Dismiss pursuant to its authority
26 under Rule 4.

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1 B. The Petition Is Not A Second and Successive Petition.

2 A federal court must dismiss a second or successive petition that raises the same grounds as a
3 prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive petition
4 raising a new ground unless the petitioner can show that 1) the claim rests on a new, retroactive,
5 constitutional right or 2) the factual basis of the claim was not previously discoverable through due
6 diligence, and these new facts establish by clear and convincing evidence that but for the
7 constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying
8 offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the district court that decides whether a
9 second or successive petition meets these requirements, which allow a petitioner to file a second or
10 successive petition.

11 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by this
12 section is filed in the district court, the applicant shall move in the appropriate court of appeals for an
13 order authorizing the district court to consider the application." In other words, Petitioner must
14 obtain leave from the Ninth Circuit before he can file a second or successive petition in district court.
15 See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or
16 successive petition unless the Court of Appeals has given Petitioner leave to file the petition because
17 a district court lacks subject-matter jurisdiction over a second or successive petition. Pratt v. United
18 States, 129 F.3d 54, 57 (1st Cir. 1997); Greenawalt v. Stewart, 105 F.3d 1268, 1277 (9th Cir. 1997),
19 *cert. denied*, 117 S.Ct. 794 (1997); Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).
20 Because the current petition was filed after April 24, 1996, the provisions of the Antiterrorism and
21 Effective Death Penalty Act of 1996 (AEDPA) apply to Petitioner's current petition. Lindh v.
22 Murphy, 521 U.S. 320, 327 (1997).

23 Respondent contends that Petitioner has had twelve parole suitability hearings, commencing
24 with the original hearing in 1993 and concluding with the latest hearing, his eleventh successive and
25 twelfth overall suitability hearing, on August 19, 2008. (Doc. 12, p. 2). Respondent also contends
26 that the instant petition alleges defects in Petitioner's ninth subsequent suitability hearing and tenth
27 overall hearing, which occurred on June 28, 2006. (Id., p. 4). Respondent further argues that
28 Petitioner has already unsuccessfully challenged that same 2006 hearing in a habeas petition in case

1 no. 1:08-cv-01556-OWW-YNP. (Id., p. 2). Further, Respondent contends that nothing in the face of
2 the petition indicates that Petitioner is challenging any suitability hearing other than the 2006
3 hearing. Therefore, Respondent reasons, the instant petition is a second and successive petition and,
4 there being no indication that the United States Court of Appeals for the Ninth Circuit has given
5 Petitioner permission to file a successive petition, the instant petition should be dismissed.

6 For his part, Petitioner has opposed Respondent's motion to dismiss by contending case no.
7 1:08-cv-01556-OWW-WMW and the instant case involve different suitability hearings, although
8 Petitioner again does not identify which hearing he is challenging in this petition.

9 The Court has reviewed the exhibits filed by Petitioner with the instant petition, despite the
10 fact that, because the documents were lodged rather than filed, they were unavailable for Respondent
11 to review in preparing the motion to dismiss. Exhibit B to the lodged documents is a complete
12 transcript of Petitioner's June 26, 2007 parole suitability hearing. (Doc. 2, Exh. B). Although the
13 lodged document contain brief excerpts of various other suitability hearings, the only complete
14 transcript is of the June 26, 2007 hearing.

15 While an express allegation by Petitioner that identified the date of the parole suitability
16 hearing he was challenging might have avoided the expenditure of resources entailed in the motion
17 to dismiss and this Findings and Recommendations, it nonetheless seems apparent from the lodged
18 documents, as well as the timing of the state habeas petitions that exhausted Petitioner's claims in
19 state court, that Petitioner is in fact challenging the June 26, 2007 parole suitability hearing. (Doc. 2,
20 Exh. B). Respondent does not contend that Petitioner has previously challenged the June 26, 2007
21 hearing by a federal habeas corpus petition in this Court. Nor does the record contain any evidence
22 that such a prior challenge to the 2007 hearing was ever made. Accordingly, the Court concludes
23 that the instant petition is not successive to the petition in case no. 1:08-cv-01556-OWW-WMW.
24 Hence, Respondent's motion to dismiss should be denied.

25 If the United States District Judge adopts these Findings and Recommendations, the matter
26 will be remanded back to the Magistrate Judge for issuance of an order to answer the petition, which
27 will include service of all relevant documents, including the lodged documents contained in
28 Document #2, on Respondent.

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RECOMMENDATION

For the foregoing reasons, the Court HEREBY RECOMMENDS that Respondent’s motion to dismiss (Doc. 12), be DENIED.

This Findings and Recommendations is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within twenty (20) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: January 7, 2010

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE