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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GUILLERMO GARCIA,)	1:09-cv-1648-AWI-SKO-HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATION TO
)	DENY PETITIONER'S APPLICATIONS
)	FOR DEFAULT JUDGMENT
v.)	(DOCS. 13, 16)
)	
CALIFORNIA DEPARTMENT OF)	
CORRECTIONS, et al.,)	
)	
Respondents.)	
)	
)	

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) (1) and Local Rules 72-302 and 72-304. Pending before the Court are Petitioner's two applications for default judgment.

I. Background

On January 4, 2010, the Court directed Respondent to file a response to the petition no later than sixty (60) days after service of the order. On March 4, 2010, Respondent served by mail on Petitioner and timely filed in this Court a motion to

1 dismiss in response to the petition. (Doc. 12, pp. 1, 5.)

2 On March 18, 2010, Petitioner filed a notice and application
3 for default judgment based on Petitioner's understanding that
4 Respondent had not timely responded to the petition. (Doc. 13,
5 pp. 1-2.) On April 22, 2010, Petitioner filed a motion for an
6 extension of time within which to respond to the motion to
7 dismiss; Petitioner stated in a declaration that because he had
8 not received the motion to dismiss until April 14, 2010, he had
9 filed the application for default judgment. (Doc. 15 p. 2.)
10 Also on April 22, 2010, Petitioner filed another application for
11 default judgment (Doc. 16) in which he referred to Respondent's
12 failure to answer the petition.

13 Respondent has not responded to the applications for default
14 judgment. However, the pertinent facts are clear, and the Court
15 finds that the motions are ready for decision.

16 II. Application for Default Judgment

17 Here, as detailed above, the documents filed in this case
18 reveal that the Respondent timely responded to the petition. The
19 Court thus finds that there has been no delay in the response to
20 the petition.

21 Further, the filing of a motion to dismiss instead of an
22 answer was authorized by the Court's order of January 4, 2010,
23 which referred to the possibility of Respondent's filing a motion
24 to dismiss and set forth a briefing schedule for any such motion.
25 (Doc. 7, p. 2.) It is established that the filing of a motion to
26 dismiss is authorized by Rule 4 of the Rules Governing Section
27 2254 Cases in the District Courts. Rule 4, Advisory Committee
28 Notes, 1976 Adoption and 2004 Amendments. Here, the motion filed

1 by Respondent was based on an absence of a basis for granting
2 federal habeas relief because the Petitioner's complaint did not
3 affect the legality or duration of his confinement. This Court
4 has limited jurisdiction and is mindful of its continuing duty to
5 determine its own subject matter jurisdiction and to dismiss an
6 action where it appears that the Court lacks jurisdiction. Fed.
7 R. Civ. P. 12(h)(3); CSIBI v. Fustos, 670 F.2d 134, 136 n. 3 (9th
8 Cir. 1982) (citing City of Kenosha v. Bruno, 412 U.S. 507, 511-
9 512 (1973)); Billingsley v. C.I.R., 868 F.2d 1081, 1085 (9th Cir.
10 1989). The Court finds that the filing of a motion to dismiss
11 was appropriate.

12 Finally, the Court notes that in any event, a petitioner is
13 not entitled to a default judgment where a respondent fails to
14 respond timely to a petition for writ of habeas corpus. Title 28
15 U.S.C. § 2241(c)(3) provides that the writ of habeas shall not
16 extend to a prisoner unless he is in custody in violation of the
17 Constitution, laws, or treaties of the United States. Section
18 2243 provides that the Court shall summarily hear and determine
19 the facts and dispose of the matter as law and justice require.

20 It is established that it is the petitioner's burden to show
21 that he is in custody in violation of the laws of the United
22 States. Walker v. Johnston, 312 U.S. 275, 286-87 (1941). A
23 failure by state officials to comply timely with the deadlines
24 set by the Court does not relieve Petitioner of this burden of
25 proof or entitle him to entry of a default or a default judgment.

26 Gordon v. Duran, 895 F.2d 610, 612 (9th Cir. 1990); see also
27 Bleitner v. Welborn, 15 F.3d 652, 653 (7th Cir. 1994) (no
28 entitlement to default judgment because of untimely response);

1 United States ex rel. Mattox v. Scott, 507 F.2d 919, 924 (7th
2 Cir. 1974) (late filing of motion to dismiss did not entitle a
3 petitioner to entry of default); Bermudez v. Reid, 733 F.2d 18,
4 21 (2nd Cir. 1984) (late filing of answer did not justify default
5 judgment).

6 III. Recommendation

7 Accordingly, pursuant to the foregoing analysis, it is
8 RECOMMENDED that Petitioner's applications for default judgment
9 be DENIED.

10 This report and recommendation is submitted to the United
11 States District Court Judge assigned to the case, pursuant to the
12 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 72-304 of the
13 Local Rules of Practice for the United States District Court,
14 Eastern District of California. Within thirty (30) days after
15 being served with a copy, any party may file written objections
16 with the Court and serve a copy on all parties. Such a document
17 should be captioned "Objections to Magistrate Judge's Findings
18 and Recommendations." Replies to the objections shall be served
19 and filed within fourteen (14) days (plus three days if served by
20 mail) after service of the objections. The Court will then
21 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
22 (b) (1) (C). The parties are advised that failure to file
23 objections within the specified time may waive the right to
24 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
25 1153 (9th Cir. 1991).

26
27 IT IS SO ORDERED.

28 **Dated: May 10, 2010**

/s/ Sheila K. Oberto

UNITED STATES MAGISTRATE JUDGE

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